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In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a charge of unlawful employment discrimination filed by a Commissioner of the Equal Employment Opportunity Commission under Section 706(b) of Title VII of the Civil Rights Act of 1964 is invalid because it sets forth the asserted discriminatory practices in general terms rather than articulating the factual basis for the allegations.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 676 F.2d 322. The opinion of the district court (App. B, *infra*, 15a-31a) is published at 523 F. Supp. 79.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982 (App. C, *infra*, 32a-33a). The opinion of the court of appeals was modified and a petition for rehearing was denied on July 20, 1982 (App. A, *infra*, 10a-14a; App. D, *infra*, 34a-39a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer * * * within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission.

Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), provides:

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

Section 710 of Title VII, 42 U.S.C. 2000e-9, provides:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 [Section 11 of the National Labor Relations Act] shall apply.

Section 1601.12 of the Equal Employment Opportunity Commission's Procedural Regulations, 29 C.F.R. 1601.12, provides in pertinent part:

(a) Each charge should contain the following:

* * * * *

"(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

* * * * *

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein.

The Commission's Standards for Selecting Systemic Respondents (*E.E.O.C. Compl. Man. (CCH)* § 16.2 (1979)) and the Procedure for Selecting Systemic Respondents (*id.* § 16.3) are set forth in App. E, *infra*, 40a-43a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. Section 703, 42 U.S.C. 2000e-2. Under the Act, charges of discrimination may be filed by or on behalf of a person aggrieved, or by a member of the Equal Employment Opportunity Commission. Section 706(b), 42 U.S.C. 2000e-5(b). Whenever a charge is filed, Section 706(b) provides that, within ten days, the Commission "shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the respondent. 42 U.S.C. 2000e-5(b). The Commission must then undertake an investigation to determine whether

reasonable cause exists to believe that the charge is true. *Ibid.* During the course of this investigation, the Commission is entitled to inspect and copy any evidence of the person or firm being investigated (Section 709(a), 42 U.S.C. 2000e-8(a)), and may issue subpoenas that can be enforced upon application to the district courts. Section 710, 42 U.S.C. 2000e-9 (incorporating Section 11 of the National Labor Relations Act, 29 U.S.C. (& Supp. IV) 161). If, at the conclusion of the investigation the Commission finds no reasonable cause, the charge is dismissed. Section 706(b), 42 U.S.C. 2000e-5(b). If, however, the Commission concludes that reasonable cause exists, it must endeavor to eliminate the alleged unlawful practice through informal methods of conference, conciliation and persuasion before resorting to a civil enforcement action brought in federal court. Section 706(b) and (f), 42 U.S.C. 2000e-5(b) and (f).[1]

Section 706(b) requires that all charges "shall be in writing under oath or affirmation, and shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)). The Commission's regulations provide that a charge of discrimination should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices" (29 C.F.R. 1601.12(a)(3)), but further provide that, notwithstanding the preceding requirements, a written charge is sufficient if it identifies the parties and "describe[s] generally the action or practices complained of" (Section 1601.12(a)(5)).

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[1] Should informal conciliation efforts fail, the Commission is empowered to bring a civil action against any respondent "not a government, governmental agency, or political subdivision" (Section 706(f), 42 U.S.C. 2000e-5(f)). Cases involving governmental agencies or other political subdivisions are "refer[red] * * * to the Attorney General who may bring a civil action against such respondent" (*ibid.*).

Many charges are filed directly by aggrieved complainants. Commissioners' charges, however, are filed in two circumstances: to protect the identity of an aggrieved individual, see 29 C.F.R. 1601.7 and 1601.11, and to alleviate instances of systemic discrimination that may not be readily identifiable on the basis of individual complaints alone. See, e.g., *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971). The Commission has published guidelines to aid commissioners in filing systemic discrimination charges. *E.E.O.C. Compl. Man.*, App. E, *infra*, 40a-43a. Under these systemic guidelines, commissioners' charges may be issued against respondents that meet one or more of the published standards. App. E, *infra*, 40a-41a.[2] These standards are applied to "an analysis of EEO reporting data and other available information," including individual charge files and data from other administrative agencies. *Id.* at 41a-42a. A potential systemic charge passes through successive stages of staff review before being presented to a commissioner with a memorandum detailing the preliminary data supporting issuance of a charge. *Id.* at 41a-43a. Although a charge by an aggrieved individual may provide the ba-

[2] Relevant factors under the systemic guidelines include: whether an employer "continue[s] in effect policies and practices which result in low utilization of available minorities and/or women;" whether an employer hires "a substantially smaller proportion of minorities and/or women" in its higher paid than its lower paid job categories; whether an employer maintains recruitment, hiring, assignment, promotion, discharge or other policies not justified by business necessity "that have an adverse impact on minorities and/or women;" whether an employer utilizes restrictive employment practices that "are likely to be used as models for other employers;" and whether an employer provides available minorities and women with fair access to employment if the employer has "substantial numbers of employment opportunities" (App. E, *infra*, 40a-41a).

sis of a systemic charge, see 29 C.F.R. 1610.6, commissioners' charges generally are based upon an analysis of statistical data provided by employers.

2. On September 27, 1979, Eleanor Holmes Norton, then Chair of the Commission, filed a commissioner's charge against the Shell Oil Company, alleging unlawful employment practices at Shell Oil's Wood River Refinery, Wood River, Illinois. The charge was the product of the Commission's systemic charge process, and it recited generally that Shell "has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment" (App. F, *infra*, 44a). The charge stated that such discrimination resulted specifically from Shell's unlawful exclusion of Blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions" and the company's similar exclusion of women from "managerial, professional, technical, craft, operative, laborer and service worker positions." *Ibid.* The charge was subsequently amended to state that Commissioner Norton had reason to believe that Shell had engaged in the unlawful practices on a continuing basis from at least July 2, 1965, to the present. *Id.* at 47a. See *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337-1338 (9th Cir. 1980).

Shell received a copy of the charge in October 1979, along with a request for information regarding its employment practices. Section 709(a), 42 U.S.C. 2000e-8(a). Shell objected to the request for information, insisting that the statistical profile of its Wood River Refinery was "clearly not the profile anticipated for a Commissioner's Charge."[3] On May 15, 1980, the

[3] Letter from R.B. Rice to W. Ed Mansfield (Mar. 7, 1980), included in Exh. G to Affidavit of W. Ed Mansfield, Civ. No. 81-5020 (S.D. Ill.).

Commission issued a subpoena duces tecum requiring Shell to produce certain employment information covering the years 1976 to the present. Shell subsequently filed this suit in federal district court in Missouri to quash the subpoena and enjoin the Commission's investigation. Shell alleged that the charge was invalid under Section 706(b) because it failed to disclose sufficient facts to form a basis for the allegations of discrimination.[4] In February 1981, the Commission filed an action in the Southern District of Illinois to enforce the subpoena. Civ. No. 81-5020 (S.D. Ill.). The enforcement action was transferred to Missouri, where the district court rejected Shell's arguments and enforced the Commission's subpoena.

The district court concluded that Shell's "allegation that the Commissioner's charge does not specify sufficient facts is * * * meritless" (App. B, *infra*, 24a). The court recognized that the "purpose of a charge under section 706, 42 U.S.C. 2000e-5, is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case" (*ibid.*). The court further noted that, under Commission regulations, a charge "is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" (App. B, *infra*, 25a). 29 C.F.R. 1601.12(b). The court therefore concluded that the present charge "is sufficient, because it is a typewritten statement which identifies the parties involved as being Shell Oil Company and the EEOC,

[4] Shell presented a number of other objections to enforcement of the subpoena, contending, inter alia, that the subpoena contravened the terms of the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.*, and the Trade Secrets Act, 18 U.S.C. 1905, as well as the Due Process Clause of the Fifth Amendment. See App. B, *infra*, 17a-25a. The district court (*ibid.*) and the court of appeals (App. A, *infra*, 9a, 13a) rejected these claims.

and it describes generally the practices complained of as failing or refusing to recruit, hire, promote, train, assign or select Blacks and/or females for managerial, professional, technical, craft, and service worker positions, inter alia, because of their race and/or sex" (App. B, *infra*, 25a).

On appeal, the Eighth Circuit reversed (App. A, *infra*, 1a-14a). The panel held that the charge failed to state "sufficient facts to comply with the date, place and circumstances requirements of section 706(b)" (App. A, *infra*, 5a). The court found that the specification of July 2, 1965, as the beginning date for Shell's alleged continuing misconduct was insufficient because "[w]e find no factual basis" to support that date (*id.* at 7a). The court further held that the circumstances of the charge must be supported by an articulated "factual basis" (*id.* at 8a). The court reasoned that "the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations" (*ibid.*)[5] Notwithstanding the provision of Section 706(b), stating that charges "shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)), the court concluded that "[a] sufficient Commissioner's charge should contain the following information: the type of information upon which the charge is based; the approximate dates of the al-

[5] The court stated that a charge without an underlying factual basis "fails to give the employer sufficient notice," citing *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 41 (4th Cir. 1971) (App. A, *infra*, 8a). *Graniteville*, however, expressly held that a charge under Section 706 need not "state sufficient facts to make out a prima facie case," but rather need only "put the respondent on notice of the practice or violation with which it is charged" (438 F.2d at 38).

leged unlawful employment practices; the nature of the charge (e.g., failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (e.g., applicant, employee, former employee)" (App. A, *infra*, 12a).[6]

REASONS FOR GRANTING THE PETITION

The opinion below directly conflicts with the decisions of six other circuits that have considered the pleading requirements imposed by Section 706(b) of Title VII of the Civil Rights Act of 1964. The decision ignores the fact that a Section 706(b) charge merely initiates an administrative investigation by the Commission, and the court's insistence on detailed factual pleading seriously disrupts the "integrated, multistep enforcement procedure" embodied in Title VII. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). Moreover, because the decision authorizes district courts to review administrative charges for sufficiency, it erroneously affords litigants a disruptive and dilatory means of halting administrative proceedings at their very outset. Cf. *FTC* v. *Standard Oil Co. ("Socal")*, 449 U.S. 232 (1980). The decision thus presents a significant obstacle to the processing of numerous charges currently pending before the Commission.

1. As noted by Chief Judge Lay in his dissent to the denial of rehearing en banc (App. D, *infra*, 34a-35a), the opinion of the panel below places the Eighth Circuit in direct conflict with the decisions of at least six other circuits. *Sparton Southwest, Inc.*, v. *EEOC*, 461 F.2d 1055, 1059 (10th Cir. 1971) (en banc); *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337-1338 (9th Cir. 1980);

[6] On July 20, 1982, the court denied the government's motion for rehearing en banc, Chief Judge Lay dissenting. Chief Judge Lay noted that the decision placed the circuit "in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a title VII charge" (App. D, *infra*, 35a).

General Employment Enterprises, Inc. v. *EEOC*, 440 F.2d 783, 784 (7th Cir. 1971); *Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799, 800-801 (6th Cir.), cert. denied, 400 U.S. 942 (1970); *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d 160, 162-164 (5th Cir. 1975); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 37-39 (4th Cir. 1971). These courts have uniformly concluded that a Title VII charge need not incorporate a detailed "factual basis," as required by the court below (App. A, *infra*, 9a, 14a).

To be sure, Section 706(b) requires that an employer receive notice, within 10 days, of any charge filed with the Commission. That notice, moreover, must contain the "date, place and circumstances of the alleged unlawful employment practice" (42 U.S.C. 2000e-5(b)). But, as the Ninth Circuit recently stated, Section 706(b) "impose[s] no strict technical pleading requirement upon complainants, whether they be private parties or the Commissioners of the EEOC." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. "The purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. * * * [The section] only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged." *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 38.

In accordance with these principles, the courts of appeals have uniformly upheld Section 706(b) charges against attack on sufficiency grounds. Except for the decision below, no court of appeals has set aside a commissioner's charge under Title VII for failure to specify its "factual basis" (App. A, *infra*, 9a, 14a). On the contrary, the reported decisions consistently uphold Title VII charges that are no more specific factually than the

one found deficient below.[7] Indeed, the only prior reported court of appeals opinion invalidating a charge under Section 706(b) did so not because of a failure to specify a factual basis for the charge, but rather because the charge contained no date whatsoever for the alleged unlawful practices. *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1337-1338. The court, however, emphasized that Section 706(b) places "no strict technical pleading requirement" upon the Commission, and specifically noted that "a good faith estimate of the probable time periods" involved in a charge would be sufficient to meet the "date" requirement of the statute. 643 F.2d at 1338. Moreover, the court stressed that a "listing of the nature of the alleged employment practices, even though essentially conclusory in nature, [is] suffi-

[7] See, e.g., *Sparton Southwest, Inc.* v. *EEOC*, *supra*, 461 F.2d at 1058 (charge alleges that "[r]espondent discriminatorily fails and/or refuses to recruit and/or hire Negroes, Indians and Spanish-Surnamed Americans in the same manner it recruits and/or hires Anglos"); *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 783 (commissioner's charge alleges that employer violates Title VII by "discriminatorily failing or refusing to hire Negroes and Jewish people"); *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800 (commissioner's charge alleges that employer "has engaged in the following unlawful employment practices: 1. Maintenance of racially restricted job classifications. 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs. 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs"); *New Orleans Public Service, Inc.* v. *Brown*, *supra*, 507 F.2d at 163-164 (charge quotes statistics to support allegation that "[r]espondent employer discriminatorily refuses or fails to recruit and hire Negroes, Spanish Surnamed Americans, Jews and females in the same manner it recruits and hires Caucasions," but court explicitly notes that charge would be sufficient "even without the statistical information which this charge contains"); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 34 n.1 (charge alleges that "Negroes are hired to the traditional Negro jobs and regardless of length of service, Negroes are not promoted or considered for better jobs as are the white employees").

cient to comply with the 'circumstances' requirement" of Section 706(b). 643 F.2d at 1337. Significantly, the charge in *Dean Witter*, like the charge in this case, set forth the alleged unlawful practices in general terms without any supporting "factual basis."[8]

The court below did not attempt to distinguish the cases, noted above, that support the sufficiency of the present charge. Rather, the court, in simple disagreement with the previously unanimous conclusion to the contrary, imposed a detailed factual pleading requirement upon the Commission. Its sole basis for doing so is the proviso in Section 706(b) that an employer be notified of the "date, place and circumstances" of any conduct allegedly in violation of Title VII. 42 U.S.C. 2000e-5(b).

The court noted that the "place" requirement of Section 706(b) was not in dispute—the charge clearly identified the Wood River Refinery as the site of the alleged discrimination (App. A, *infra*, 7a n.4). The court,

[8] The charge in *Dean Witter* alleged that the employer had discriminated against Blacks, women, Spanish-surnamed Americans and other minorities on the basis of race, sex, and national origin by policies that included but were not limited to (643 F.2d at 1336 n.1):

> 1. Refusing to recruit and hire Blacks, women, Spanish-surnamed Americans and other minorities in the same manner and on the same basis in which white males have been recruited and hired;
>
> 2. Discriminatorily assigning and limiting Blacks, women, Spanish-surnamed Americans and other minorities to positions with lower pay and less opportunity for advancement than those to which white males have been assigned;
>
> 3. Refusing to provide training and promotion opportunities for Blacks, women, Spanish-surnamed Americans and other minorities in the same manner in which such opportunities have been provided white males;
>
> 4. Discriminatorily subjecting Blacks, women, Spanish-surnamed Americans and other minorities to different terms and conditions of employment, including leave, benefits, and standards for disciplinary actions and terminations, than those which are applied in the case of white males.

however, held that the "date" requirement was not met. Specification of July 2, 1965, as the beginning date for Shell's alleged continuing violations was insufficient, the court concluded, because that date lacked a "factual basis" (*id.* at 7a). The court ignored the fact that "[t]he filing of a charge is the first step in the EEOC administrative process, and understandably, the EEOC may be uncertain about the temporal scope of the challenged practices, especially where a pattern or practice charge is involved." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. The charge in this case alleges systemic discriminatory practices of a continuing nature, and, prior to administrative investigation, the Commission has no way of knowing exactly when such practices began. It therefore is not unreasonable for a commissioner to select July 2, 1965—the first day that Title VII made the complained of practices illegal—as the beginning date for Shell's alleged misconduct. The court below erred in holding that this "good faith estimate of the probable time periods" involved did not meet the requirements of Section 706(b). *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

The court similarly erred in concluding that the charge's specification of Shell's alleged unlawful conduct is insufficient to meet the "circumstances" requirement of Section 706(b). The charge notified Shell that a commissioner of the EEOC had reason to believe that the company had excluded Blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions," and had confined women to office and clerical positions (App. F, *infra*, 44a). Thus, the charge clearly informed Shell of the substance of the allegations against it. Unless the Commission must present its proof along with its charge, it is difficult to see how additional "facts" would materially aid Shell at the outset of this proceeding. Indeed, as the Sixth Circuit has noted, "it is difficult to see what additional informa-

tion the Commissioner should set forth as facts supporting [her] charge." *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800.[9]

2. The decision below disregards the primary function of a Section 706(b) charge. As this Court noted in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977), Title VII "establish[es] an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." The initial charge under Section 706(b) does not commence a formal civil enforcement action against a respondent, but rather is merely the first step in an integrated procedure that emphasizes informal conciliation. The pleading requirement imposed by the court below seriously disrupts this statutory scheme.

The primary purpose of a Section 706(b) charge is to initiate an administrative investigation to determine whether there is reasonable cause to believe that an employer has violated Title VII. Formal judicial enforcement actions are commenced only after a finding of reasonable cause and failure of voluntary conciliation efforts. 42 U.S.C. 2000e-5(b). The lower court's imposition of a strict, factual pleading requirement upon the Commission at the very outset of a Title VII proceeding, however, interrupts the orderly flow of this carefully designed process. Indeed, it interposes an obstacle that could be fatal to many otherwise meritorious Title VII proceedings.

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[9] The court below, moreover, was not particularly helpful in delineating what additional "facts" the Commission should supply on remand. The court merely noted that a "sufficient" charge should contain "the nature of the charge (e.g., failure to hire, failure to promote, dismissal)" (App. A, *infra*, 8a, 12a). The charge, however, already sets forth the "nature" of its allegations in the most straightforward terms: Shell allegedly failed to "recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race." App. F, *infra*, 44a.

The court's "factual basis" requirement, as noted by Chief Judge Lay, "require[s] the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause" (App. D, *infra*, 38a). The decision, in effect, "place[s] the cart before the horse" (*id.* at 37a) and means "that the Commission, in its investigation, must not ask any questions to which it does not already know the answers." *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d 237, 241 (9th Cir. 1971). Such a result, the Ninth Circuit has properly noted, "has about it the aura of another, and bygone, legal era" (*ibid.*).

"Since a Commissioner's charge does no more than initiate administrative fact finding and voluntary conciliation," there is no sound reason to require detailed factual pleading under Section 706(b). *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784. Although Section 706(b) charges are a condition precedent to agency action under Title VII, they, like their counterpart charges under the National Labor Relations Act, do not limit the scope of any subsequent findings of reasonable cause by the Commission, nor do they define the limits of a resulting Commission enforcement action. Their "purpose is merely to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959). "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980).

The National Labor Relations Act served as the remedial model for Title VII. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366 (1977). Precisely because a charge simply initiates administrative inquiry, generally worded charges of unlawful employment practices under the National Labor Relations Act have consistently been recognized as suf-

ficient. *NLRB* v. *Fant Milling Co.*, *supra*, 360 U.S. at 307. See generally *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F.2d 1298 (5th Cir. 1978).[10] By parity of reasoning, generally worded charges under Section 706(b) of Title VII should likewise be deemed sufficient. "This is consistent with the broad remedial purposes of the Act which could only be thwarted by sustaining technical defenses of alleged violators." *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784.

3. The decision below not only disrupts the orderly flow of administrative proceedings under Title VII, it ignores the clear wording of Section 706(b) as well. Section 706(b) expressly provides that "charges * * * shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). The Commission, therefore, not the federal judiciary, has the primary responsibility of determining whether a charge under Section 706(b) is sufficient.[11]

[10] The NLRA has often guided courts in construing the Civil Rights Act of 1964. *Zipes* v. *Trans World Airlines Inc.*, No. 78-1545 (Feb. 24, 1982), slip op. 8 n.11; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-804 (1973); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-769 (1976).

[11] The first sentence of Section 706(b) requires that the Commission "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on a respondent within 10 days. The court below stated that whether the "date, place and circumstances" provision applies to the notice requirement or to the charge itself "is not entirely clear" (App. A, *infra*, 6a n.3). The court, however, without stating why it resolved any supposed ambiguity the way it did, applied the "date, place and circumstances" provision to the charge (*id.* at 8a, 12a). The court erred in imposing such requirements on a Section 706(b) charge. Even assuming, arguendo, that the first sentence of Section 706(b) is ambiguous as to whether the date, place and circumstances of any alleged misconduct must be in the notice of a charge or the charge itself, the second sentence of the statute clarifies that ambiguity. That sentence clearly provides that charges "shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)).

The Commission has consistently held that a charge that generally describes the practices complained of is sufficient under Title VII. See Equal Employment Opportunity Commission Procedural Regulations, 29 C.F.R. 1601.11(b), 31 Fed. Reg. 10269 (1966). Current Commission regulations state that a charge shall contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. 1601.12(a)(3). Notwithstanding those requirements, however, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." Section 1601.12(b).

The longstanding interpretation of a federal agency charged with the administration of its founding statute is entitled to great respect. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). The deference accorded an agency's interpretation is particularly great when that interpretation has remained consistent over a long period of time. *Ibid.* See, e.g., 31 Fed. Reg. 10269 (1966). The district court properly applied the Commission's regulations and concluded that the commissioner's charge in this case was sufficient inasmuch as it identified the parties involved as Shell Oil Company and the Commission and described generally the practices complained of as "failing or refusing to recruit, hire, promote, train, assign or select Blacks and/or females for managerial, professional, technical, craft, and service worker positions, inter alia, because of their race and/or sex" (App. B, *infra*, 25a).

The court of appeals, unlike the district court, erroneously disregarded the Commission's longstanding determination that a charge is sufficient if it generally sets forth the nature of the practices complained of and specifies the parties involved. "[T]he EEOC does not

function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 368. To paraphrase this Court's opinion in *Occidental Life*, "In view of the federal policy requiring employment discrimination claims to be investigated by the [Commission] and, whenever possible, administratively resolved before suit is brought in federal court, it is hardly appropriate [to shift the determination of whether an initial charging document is sufficient from the Commission to the federal courts]." *Ibid.* The court below detailed what "[a] sufficient Commissioner's charge should contain" (App. A, *infra*, 8a, 12a). Section 706(b), however, unambiguously assigns that duty to the Commission. 42 U.S.C. 2000e-5(b).

4. The decision below imposes pleading requirements on the Commission that have been specifically rejected by Congress. In 1972, Congress enacted extensive changes to Title VII, designed in part to increase the investigative and enforcement powers of the Commission. See generally *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 358-373. At the time of those amendments, four circuits had concluded that Section 706(b) charges need only describe the alleged discriminatory conduct in general terms. *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243; *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800; *General Employment Enterprises, Inc.*, *supra*, 440 F.2d at 784; *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 37-39. Apparently because it was aware of the import of these decisions, Congress considered requiring that a commissioner's charge set forth "the facts upon which it is based and the person or persons aggrieved" (H.R.

1746, 92d Cong., 1st Sess. § 3(a) (1971)). That requirement, however, was rejected in favor of the present version of Section 706(b), which calls for a respondent to be given notice of any charge, whether filed by a commissioner or a private party, within ten days.[12] Thus, Congress expressly rejected any requirement that a commissioner's charge under Section 706(b) set forth its underlying factual basis.[13] The lower court's imposition of such a requirement flies squarely in the face of this legislative history.[14]

[12] The 1972 amendments also eliminated the requirement of former Section 706(a) that a commissioner's charge be supported by "reasonable cause to believe a violation of this title has occurred." Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 259 (previously codified at 42 U.S.C. (1970 ed.) 2000e-5(a)). Section 706(b) currently establishes the same standard for commissioner's charges as for those of private charging parties, viz., that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)).

[13] Congress' undoubted awareness of the preamendment decisions that had rejected the interpretation of Section 706 adopted by the court below underscores Congress' failure to impose a factual pleading requirement upon Section 706(b). See, e.g., *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243. Congress' failure to act in the light of these decisions, while making other changes to the Act, indicates congressional approval. *EEOC* v. *Associated Dry Goods Corp.*, *supra*, 449 U.S. at 600; *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

[14] The lower court's factual pleading requirements are derived from the notice provision of Section 706(b). Congress was concerned in 1972 that employers be given prompt notice of pending charges. See *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 371. That concern, however, was fully met by the commissioner's charge here, which clearly indicated to Shell the parties involved, the location of the alleged discriminatory activities, and generally alleged that Shell had confined its women employees in office and clerical positions and its black employees in operative and laborer positions from at least the effective date of Title VII. Such allegations would certainly be sufficient to provide notice in a complaint brought by the Commission in federal court after a finding of reasonable cause. It would be highly anomalous to require

5. The decision in this case will unavoidably result in a spate of litigation challenging the sufficiency of commissioners' charges under Title VII. Litigants in the Eighth Circuit will undoubtedly challenge the Commission to demonstrate the "facts" supporting a proposed investigation of their employment practices. Litigants will request, and courts may sometimes order, depositions of commissioners and other Commission staff members to inquire into the "factual basis" of pending discrimination charges. See, *e.g.*, *EEOC* v. *K-Mart Corp.*, 526 F. Supp. 121 (E.D. Mich. 1981), appeal pending, No. 81-1722 (6th Cir. filed Nov. 17, 1981). The end result will be that the investigator will become the investigated, and the orderly processing of discrimination claims under Title VII will grind to a halt.[15]

This result cannot be tolerated. The Court's recent decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), requires reversal of the decision below. The court of appeals has stymied an administrative investigation of Shell Oil because of the purported insufficiency of an administrative charge. That result is clearly contrary to the Court's emphatic holding in *Socal* that federal courts may not intrude upon an administrative proceeding at its very outset.

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the Commission to plead evidence supporting its allegations at the threshold of its administrative investigation. There is no reason to impose on Section 706(b) charges "a standard even more strict than that required by our Rules of Civil Procedure, notwithstanding that the pleadings are even less significant in the administrative process than in the judicial." *Sparton Southwest, Inc.* v. *EEOC*, *supra*, 461 F.2d at 1059.

[15] The decision below will affect well over 100 pending commissioners' charges. The great majority of these charges, moreover, have been filed by commissioners who have served their terms and left the government. The legal and administrative difficulties created by the court of appeals' decision are therefore compounded by the fact that it is unclear whether a sitting commissioner can amend a charge to state what factual basis a former commissioner might have considered when issuing the charge.

In *Socal*, the Court held that the issuance of an administrative complaint by the Federal Trade Commission does not constitute final agency action reviewable under 5 U.S.C. 704. The Court reasoned that the issuance of an administrative complaint was not reviewable because, like the Section 706(b) charge here, a complaint merely represents "a threshold determination that further inquiry is warranted" (449 U.S. at 241). As demonstrated by the facts of this case, review at the charging stage of an administrative proceeding results in "interference with the proper functioning of the agency and a burden for the courts" (*id.* at 242). The Court further reasoned that judicial intervention "denies the agency an opportunity to correct its own mistakes" and results in inefficient and perhaps unnecessary piecemeal review (*ibid.*).

While the above concerns are by themselves sufficient to preclude judicial intervention at the pleading stage of administrative proceedings, there is a more fundamental concern behind the Court's rejection in *Socal* of the position successfully advanced by Shell Oil below. Arguments going to the sufficiency of an agency's pleadings are hardly unique. "[E]very respondent to a Commission complaint could make the claim that [Shell] ha[s] made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes" (*Socal*, *supra*, 449 U.S. at 242-243).

The pragmatic considerations justifying the conclusion of the Court in *Socal* are amply illustrated by the course of events in this case. By pursuing its claim that the Commission has issued an insufficient charge against it, Shell has been able to thwart the commencement of an administrative investigation of its employment practices for more than three years. The decision below, moreover, supplies every respondent to a commissioner's charge in the Eighth Circuit with immedi-

ate access to judicial review on the ground that the Commission has not provided a sufficient "factual basis" for the charge. If the Commission is required to defend such actions in federal court as a matter of course, as well as submit to depositions, interrogatories and other discovery aimed at probing the Commission's internal processes (see *EEOC* v. *K-Mart*, *supra*), the "integrated, multistep enforcement procedure" (*Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 359) designed by Congress in Title VII will simply break down. The decision below erroneously and all too readily "enable[s] those subject to administrative authority unduly to delay investigations into their affairs." B. Schwartz, *Administrative Law* § 45, at 115 (1976).

Title VII of the Civil Rights Act of 1964 does not impose strict, technical pleading requirements upon complainants, whether they be private parties or the commissioners of the EEOC. A charge under Section 706(b) "is merely the first step in the administrative process, and it would defeat the Congressional scheme to impose detailed fact pleading burdens on the EEOC before it has had an opportunity to investigate the basis for the charge." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the court of appeals is manifest in light of the pertinent opinions of other courts of appeals, the statutory language and history, and this Court's opinion in *Socal*, the Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

SHELL OIL COMPANY, APPELLANT,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ELEANOR HOLMES NORTON, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LEROY CLARK, GENERAL COUNSEL, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; W. ED MANSFIELD, DISTRICT DIRECTOR, ST. LOUIS DISTRICT OFFICE, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEES.

No. 81-1811.

United States Court of Appeals,
Eighth Circuit.

Submitted March 11, 1982

Decided April 28, 1982.

Michael J. Connolly, Gen. Counsel, Philip B. Sklover, Acting Associate Gen. Counsel, Vella M. Fink, Asst. Gen. Counsel, Lorraine C. Davis, Equal Employment Opportunity Commission, Washington, D.C., for appellees.

W. Stanley Walch, Charles A. Newman, Thompson & Mitchell, St. Louis, Mo., Martin D. Schneiderman, Samuel T. Perkins, Mark B. Goodwin, Rebecca Hudsmith, Steptoe & Johson, Washington, D.C., for appellant Shell Oil Co.; Steven J. Killworth, Shell Oil Co., Houston, Tex., of counsel.

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

ROSS, Circuit Judge.

Shell Oil Company (Shell) appeals from the district court's[1] order of September 22, 1981, 523 F.Supp. 79, dismissing Shell's request for injunctive relief and enforcing the Equal Employment Opportunity Commission's (EEOC or Commission) subpoena. Shell contends the Commissioner's charge was insufficient to support the subpoena and failed to give proper notice as required by Section 706(b) of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–5(b). We agree that the charge failed to meet the requirements of Title VII.

Facts

On September 27, 1979, Eleanor Holmes Norton, then Chair of the EEOC, filed a Commissioner's charge against Shell Pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, as amended. The charge, in its entirety, stated as follows:

COMMISSIONER'S CHARGE

Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. (supp v. 1975) I charge the following employer with unlawful employment practices:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, se-

[1] The Honorable Clyde S. Cahill, Jr., United States District Judge for the Eastern District of Missouri.

lection, job assignment, training, testing, promotion, and terms and conditions of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.

2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex.

The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein. Ms. Norton verified, under oath, that she had cause to believe that Shell committed the unlawful employment practices alleged in the charge. On Janury 16, 1981, the Commissioner's charge was amended to state that Ms. Norton had reason to believe Shell engaged in the unlawful practices on a continuing basis at least from July 2, 1965, to present.

In October 1979, Shell received notice of the charge, a copy of the charge, and a Request for Information which sought details of Shell's employment practices. Shell objected to the Request based on Shell's belief that the underlying charge was insufficient. On May 15, 1980, the Commission issued a subpoena requiring Shell to produce certain evidence described in the Request for Information covering the period from 1976 to the present.[2] Shell petitioned the Commission to revoke or

[2] The subpoena directed Shell to produce, *inter alia*, lists of: employees including their sex, race, date of hire, position and salary; applicants for hire identified by race and sex; persons who sought promotion or transfers identified by race and sex, indicating the reason for selection or non-selection; vacancies filled, indicating minimum qualifications required and identity by race and sex of persons selected; employment tests administered indicating

modify the subpoena. The EEOC rejected Shell's petition and directed Shell to comply with the subpoena.

Shell filed suit in federal district court in Missouri on September 18, 1980, seeking to quash the subpoena and enjoin the Commission's investigation. Shell maintained that: (1) the charge was invalid for failure to specify facts sufficient to form a basis for the allegations of discrimination; (2) the subpoena was unduly burdensome; (3) the subpoena did not meet the requirements of the Federal Reports Act, 44 U.S.C. § 3501 *et seq.*; (4) the Commission was not authorized to obtain information regarding Shell's computer capability or to require Shell to compile information; and (5) disclosure of information by EEOC to outside consultants would violate Sections 706 and 709(e) of Title VII, 42 U.S.C. §§ 2000e-5 and 2000e-8(e). Shell sought limited discovery of documents pertaining to the Commissioner's charge.

On December 2, 1980, the Commission filed a motion to dismiss Shell's action on the grounds that the district court lacked jurisdiction to review the Commission's decision to investigate and that Shell's complaint failed to state a claim. The district court on March 6, 1981, denied the motion to dismiss.

On February 4, 1981, the Commission filed an action in federal district court in Illinois to enforce the subpoena. On Shell's motion, the enforcement action was transferred to Missouri and consolidated with Shell's action to quash the subpoena.

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the sex, race and score of each person taking such test and employment action taken as a result; training programs used, positions for which they were used, and sex and race of participants; enumerated employment criteria used by Shell such as arrest records, credit checks, previous salary, height or weight. The subpoena also requested information regarding the existence of personnel data on computer file.

After a show cause hearing, the district court concluded that Shell's claims were without merit and dismissed the action. The court held that the Commissioner had authority to issue the charge and that the charge met all the requirements of section 706 of Title VII. The district court rejected Shell's other contentions and held that the subpoena should be enforced with the limitation imposed that the Commission could not disclose the information obtained to outside consultants.

Shell filed its notice of appeal on October 9, 1981, and the district court on November 9, 1981, stayed its order pending resolution of the appeal.

Discussion

The primary issue on appeal is whether the Commissioner's charge states sufficient facts to comply with the date, place and circumstances requirements of section 706(b). We hold that the requirements were not met. We remand this case to the district court to give the EEOC an opportunity to amend the charge to comply with the requirements of section 706(b).

Shell contends the Commissioner's charge did not meet the requirements of Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) because the Commissioner failed to articulate a specific basis for the allegations of discrimination and failed to provide adequate notice of the charge. Section 706(b) states in relevant part:

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, * * * within ten days, and shall make an investigation thereof. Charges shall be in

writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

42 U.S.C. § 2000e–5(b).

Shell argues that the charge was insufficient to support the Commission's investigation because it did not specify the date or circumstances of the alleged discriminatory practices. The amended charge stated that the date of the unlawful practices was July 2, 1965, the date Title VII first became effective. The July 2 date, Shell contends, is not a good faith statement of the date of the alleged unlawful practices. Additionally, Shell argues that the charge merely lists a broad range of unlawful employment practices without stating specific circumstances to provide a basis for believing that Shell violated Title VII.

The Commission argues that Title VII does not require the EEOC to articulate a specific basis for the charge because the oath requirement contained in section 706(b) sufficiently protects employers from unfounded charges and obviates any need for a detailed statement of the facts underlying the charge. The Commission also argues that the charge met the date, place and circumstances requirements of section 706(b) in all respects.

Section 706(b) requires that the EEOC serve notice of the charge upon the charged party including "date, place and circumstances of the alleged unlawful employment practice."[3] 42 U.S.C. § 2000e-5(b). EEOC procedural regulations require each charge to contain a "statement of the facts, including pertinent dates,

[3] Whether such notice should be in the charge itself or in the notice of the charge is not entirely clear from the language of section 706(b). The better practice would be to include the date, place and circumstances in the charge itself. However, "the EEOC should be able to 'cure' any defects in the charge in its notice of the charge." *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1337 n.2 (9th Cir. 1980).

constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (1981). We find that the notice and charge were deficient because they did not adequately set out the date and circumstances of the unlawful practices.[4]

The Ninth Circuit held in *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1337-38 (9th Cir. 1980) that an EEOC charge, substantially similar to the charge issued here against Shell, did not meet the date requirement because it alleged only that the practices were "continuing." The court in *Dean Witter* stated that use of the term "continuing" may inform the employer "that the practices are continuing in the present but does not disclose whether the practices have occurred in the past, or at least, when they began in the past." *Id.* at 1338. We agree that notice should at least inform the employer of the beginning dates of the unlawful practices and include enough other information to more fully identify the individual complaint that has been used as the basis for the subpoena.

The EEOC's use of July 2, 1965, as the beginning date of Shell's Title VII violation does not meet this requirement. The purpose of disclosure of a beginning date is to protect the employer from an open-ended investigation by limiting discovery to matters relevant to the charge. *Id.* at 1338. Use of the effective date of Title VII does not give notice to the employer of the parameters of the investigation. We read section 706(b) to require "some basis in fact for the date alleged in the charge." *EEOC v. K-Mart Corp.*, 526 F.Supp. 121, 125 (E.D. Mich.1981). We find no factual basis in the EEOC's allegation of July 2, 1965, as the beginning date of the alleged Title VII violations.

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[4] The parties do not dispute the fact that a statement of the name and address of the plant at which the alleged practices occurred meets the place requirement of section 706(b).

In addition to requiring a charge to contain the date of the alleged unlawful practices, section 706(b) requires a statement of the circumstances of the alleged unlawful practices. As with the date requirement, we read this to require the statement of circumstances to be supported by some factual basis. Adequate notice of the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations. 29 C.F.R. § 1602.14(a) (1981). A charge which simply alleges discrimination in all areas of employment practice without some factual basis gives the appearance of a "fishing expedition" and fails to give the employer sufficient notice. *Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971).

A sufficient Commissioner's charge should contain the following information: the date on which a charge was filed with the Commission by an aggrieved individual; the date of the alleged unlawful employment practice; the nature of the charge (*e.g.*, failure to hire, failure to promote, dismissal); and the position of the aggrieved individual (*e.g.*, applicant, employee, former employee). We recognize that the purpose of a Commissioner's charge is to initiate an investigation where an individual is unwilling to file the charge for fear of retaliation by the employer. *Graniteville Co. (Sibley Div.) v. EEOC*, *supra*, at 39 n.6; 110 Cong.Rec. 14186-92 (1964), *reprinted in* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3301-12 (1978); *EEOC v. Dean Witter Co.*, *supra*, 643 F.2d at 1339. Therefore, we do not require the Commission to divulge information in the charge which might tend to reveal the identity of an individual who wishes to remain anonymous. But to the extent

possible, the Commission should include in the charge the factual basis for the Commissioner's belief that a Title VII violation has occurred.[5]

Additional Issues

Shell further argues on appeal that: (1) enforcement of the EEOC's subpoena would effect an illegal search and seizure because the subpoena is unduly burdensome; (2) the EEOC's investigation is in violation of the Federal Reports Act because the Commission failed to use a properly authorized questionnaire form; and (3) the EEOC lacks authority to obtain information concerning Shell's computer capabilities and information which must be compiled by computer. We find that the district court adequately disposed of these issues in its memoranda and we do not disturb that court's ruling.

Conclusion

We hold that the Commissioner's charge was deficient for failure to include a factual basis for the Commissioner's belief that Shell engaged in unlawful employment practices. We remand to the district court for proceedings consistent with our holding including amendment of the Commissioner's charge to comply with the requirements set out in this opinion.

[5] We do not doubt that the Chair of the Commission may have some basis for her statement that she believes the employer has violated Sections 703 and 707 of the Civil Rights Act of 1964. However, we believe the law requires additional factual material to comply with section 706(b) and 29 C.F.R. § 1602.14(a) (1981).

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-1811

SHELL OIL COMPANY, ET AL APPELLANTS,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

On the Court's own motion it is now here ordered that the opinion of this Court filed on April 28, 1982 be, and it is hereby, modified with the substitution of pages 7, 8, and 9, attached hereto.

July 20, 1982

Order entered at the direction of the Court.
Clerk, U.S. Court of Appeals, 8th Circuit.

The Ninth Circuit held in *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1337-38 (9th Cir. 1980) that an EEOC charge, substantially similar to the charge issued here against Shell, did not meet the date requirement because it alleged only that the practices were "continuing." The court in *Dean Witter* stated that use of the term "continuing" may inform the employer "that the practices are continuing in the present but does not disclose whether the practices have occurred in the past, or at least, when they began in the past." *Id.* at 1338. We agree that notice should at least inform the employer of the approximate dates of the unlawful practices and include enough other information to more fully identify the information that has been used as the basis for the subpoena.[5]

The EEOC's use of July 2, 1965, as the beginning date of Shell's Title VII violation does not meet this requirement. The purpose of disclosure of an approximate beginning date is to protect the employer from an open-ended investigation by limiting discovery to matters relevant to the charge. *Id.* at 1338. Use of the effective date of Title VII does not give notice to the employer of the parameters of the investigation. We read section 706(b) to require "some basis in fact for the date alleged in the charge." *EEOC v. K-Mart Corp.*, 526 F.Supp.

[5] In its petition for rehearing en banc the Commission stresses that although Commissioner's charges are often based on individual complaints, many charges are founded on statistical data gathered by the Commissioner from annual reports filed with the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs. The Commissioner for the first time reveals that the present charge was based on such statistical information.

We do not read 42 U.S.C. § 2000e–5 as prohibiting the filing of a Commissioner's charge which is based on statistical data obtained by the Commissioner from annual reports. We do hold, however, that the basic information that the charge is based on statistical data and the general nature of that da[illegible] including dates, should be disclosed in the charge.

121, 125 (E.D. Mich. 1981). We find no factual basis in the EEOC's allegation of July 2, 1965, as the beginning date of the alleged Title VII violations.

In addition to requiring a charge to contain the date of the alleged unlawful practices, section 706(b) requires a statement of the circumstances of the alleged unlawful practices. As with the date requirement, we read this to require the statement of circumstances to be supported by some factual or statistical basis. Adequate notice of the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations. 29 C.F.R. § 1602.14(a) (1981). A charge which simply alleges discrimination in all areas of employment practice without some factual or statistical basis gives the appearance of a "fishing expedition" and fails to give the employer sufficient notice. *Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971).

A sufficient Commissioner's charge should contain the following information: the type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (*e.g.*, failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (*e.g.*, applicant, employee, former employee). We recognize that one purpose of a Commissioner's charge is to initiate an investigation where an individual is unwilling to file the charge for fear of retaliation by the employer. *Graniteville Co. (Sibley Div.) v. EEOC*, *supra*, at 39 n.6; 110 CONG. REC. 14186–92 (1964), *reprinted in* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3301-12 (1978); *EEOC v. Dean Witter Co.*, *supra*, 643 F.2d at 1339. We do not require

the Commission to divulge information in the charge based on an employee complaint which might tend to reveal the identity of an individual who wishes to remain anonymous. But to the extent possible, the Commission should include in the charge the factual basis for the Commissioner's belief that a Title VII violation has occurred.[6]

Additional Issues

Shell further argues on appeal that: (1) enforcement of the EEOC's subpoena would effect an illegal search and seizure because the subpoena is unduly burdensome; (2) the EEOC's investigation is in violation of the Federal Reports Act because the Commission failed to use a properly authorized questionnaire form; and (3) the EEOC lacks authority to obtain information concerning Shell's computer capabilities and information which must be compiled by computer. We find that the district court adequately disposed of these issues in its memoranda and we do not disturb that court's ruling.

[6] We do not doubt that the Chair of the Commission may have some basis for her statement that she believes the employer has violated sections 703 and 707 of the Civil Rights Act of 1964. However, we believe the law requires additional factual material to comply with section 706(b) and 29 C.F.R. § 1602.14(a) (1981).

Conclusion

We hold that the Commissioner's charge was deficient for failure to include a factual basis for the Commissioner's belief that Shell engaged in unlawful employment practices. We remand to the district court for proceedings consistent with our holding including amendment of the Commissioner's charge to comply with the requirements set out in this opinion.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

SHELL OIL COMPANY, PLAINTIFF,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF,

v.

SHELL OIL COMPANY, ET AL., DEFENDANTS.

Nos. 80-1202-C(5), 81-0230-C(5).

United States District Court,
E. D. Missouri, E. D.

June 30, 1981

On Motion For Reconsideration and
Clarification Sept. 22, 1981.

Donna L. Harper, St. Louis, Mo., Dianna B. Johnston, Washington, D.C., for E.E.O.C.

Thomas R. Jayne, W. Stanley Walch, Charles A. Newman, Thompson & Mitchell, St. Louis, Mo., Martin D. Schneiderman, Samuel T. Perkins, Mark B. Goodwin, Steptoe & Johnson, Washington, D.C.,. for defendants in No. 80-1202-C(5) and plaintiff in No. 81-0230-C(5).

Susan J. Sandler, Houston, Tex., for Shell Oil Co.

MEMORANDUM

CAHILL, District Judge.

This matter is before the Court on various pretrial motions.

On September 27, 1979, Eleanor Holmes Norton, Chair of the Equal Employment Opportunity Commission (hereinafter EEOC), initiated a Commissioner's charge against Shell Oil Company (hereinafter Shell) under sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The charge alleged employment discrimination on the basis of race and sex at plaintiff's refinery in Wood River, Illinois. Subsequently, W. Ed. Mansfield, District Director of the St. Louis District Office of the EEOC, issued the EEOC's first request for information. An administrative subpoena duces tecum was served on Shell May 16, 1980 by Mansfield. In response thereto, on May 23, 1980, Shell filed a petition to revoke or modify the subpoena, which was denied by Mansfield on June 9, 1980. Shell filed an appeal of the petition to revoke or modify the subpoena on June 23, 1980. Likewise, Shell's appeal was denied by Leroy Clark, General Counsel of the EEOC, around August 27, 1980. Having exhausted its administrative remedies, Shell filed an action in this Court (No. 80-1202-C(5)) in order to quash the subpoena and to enjoin the EEOC, Norton, Clark, and Mansfield from their alleged unlawful and arbitrary course of conduct. Around February 4, 1981, the EEOC filed an action in the Southern District of Illinois (now No. 81-230-C(5)) against Shell and its agent, Roger Rice, to enforce the subpoena duces tecum issued by the EEOC. The actions have been consolidated and are now before this Court.

EEOC's Motion to Strike.

The EEOC moves to strike the first, third, and fourth defenses of Shell under Fed. R. Civ. P. 12(f). That rule provides in relevant part that the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Those defenses are:

1. FIRST DEFENSE: The subpoena may not be enforced because EEOC lacks authority to issue a subpoena to investigate a charge that is unlawfully filed;

2. THIRD DEFENSE: The subpoena may not be enforced because EEOC lacks authority to issue a subpoena that contravenes the terms of the Federal Reports Act, 44 U.S.C. § 3501 *et seq.*;

3. FOURTH DEFENSE: The subpoena may not be enforced because the Commission claims the authority to disclose to unnamed third parties information produced pursuant to the subpoena in contravention of Section 706b and 709e of Title VII, as amended, 42 U.S.C. 2000e-5(b) and e-8(e) and the Trade Secrets Act, 18 U.S.C. Section 1905.

EEOC claims that Shell's first defense is vague and contains insufficient facts from which an opinion can be formed as to its validity and, therefore, should be stricken. The case law indicates that a motion to strike a portion of the pleadings is a drastic remedy which is viewed with disfavor and such motions are infrequently granted. *Lunsford v. United States*, 418 F. Supp. 1045, 1051 (D.S.D. 1979); *Zamora v. Massey-Ferguson, Inc.*, 336 F. Supp. 588, 591 (S.D. Iowa 1972); *Patrick v. I. D. Packing Company*, 308 F. Supp. 821, 823 (S.D. Iowa 1969); *Vernon J. Rockler and Co., Inc. v. Minneapolis Shareholders Company*, 69 F.R.D. 1, 5 (D. Minn. 1975). The Court should defer action on a motion to strike a pleading and leave the sufficiency of the allegations for a determination on the merits where there is no showing of prejudicial harm to the moving party. *Zamora*, 336 F. Supp. at 591; *Patrick*, 308 F. Supp. at 823. Here, EEOC has not shown that it will be prejudiced if its motion to strike is denied. Furthermore, a defense is good unless it appears to a certainty that plaintiffs would succeed despite any state of facts which would be provided in support of the defense, and any doubt as to the striking of matters in a pleading should

be resolved in favor of the pleading. *Vernon J. Rockler and Co., Inc.*, 69 F.R.D. at 5; *Hunter v. International Systems & Control Corp.*, 56 F.R.D. 617, 633 (W.D. Mo. 1972). This Court cannot say with certainty that the EEOC would succeed despite any state of facts which would be provided in support of Shell's defense. Therefore, the Court in its discretion denies EEOC's motion to strike as to Shell's first defense. *See Vernon J. Rockler and Co., Inc.*, 69 F.R.D. at 5.

EEOC asserts that Shell's third defense should be stricken because the Federal Reports Act is inapplicable to subpoenas. EEOC then cites the Court to *Adams v. F. T. C.*, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed. 2d 83 (1962), which held that a subpoena meets the requirements for enforcement if the inquiry is: (1) within the authority of the agency; (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant. *See Blue Ribbon Quality Meats, Inc. v. F.T.C.*, 434 F. Supp. 159, 162 (W.D. Mo. 1976); *United States v. Empire Gas Corp.*, 419 F. Supp. 34, 37 (W.D. Mo. 1976). Although the Court does not attempt to rule on the merits, it cannot say at this time that the subpoena is not within the authority of the agency, that the demand is insufficient, or that the information sought is irrelevant. Therefore, the Court in its broad discretion denies EEOC's motion to strike as to Shell's third defense. *See Vernon J. Rockler and Co., Inc.*, 69 F.R.D. at 5.

The court having considered EEOC's argument to strike Shell's fourth defense, denies the motion to strike as to Shell's fourth defense on the same grounds that it denied the motion as to Shell's first and third defenses. Accordingly, EEOC's motion to strike is denied.

EEOC's Motion For Protective Order That Discovery Not Be Had.

EEOC moves for a protective order under Fed. R. Civ. P. 26(c) forbidding the discovery via interrogatories and the first request for production of documents sought by Shell. First, EEOC challenges Shell's third defense in its answer. This same challenge was enunciated in EEOC's motion to strike. This argument for the motion for protective order is rejected, therefore, for the reasons set out by the Court in the denial of the motion to strike.

In regard to Shell's interrogatories No. 11-13, the motion for protective order is stayed pending the filing of a certificate of privilege by the EEOC with respect to these interrogatories. (See, memorandum in support of applicant's motion for protective order, p., 4.)

After careful review of the motion and the memorandum in support of the protective order, the Court finds that EEOC's motion for protective order is denied as to Shell's interrogatories No. 1-10 and 14-17 and Shell's first request to inspect and copy documents.

Shell's Motion For Continuance.

Shell moves to continue the hearing of the Court's order to show cause scheduled for April 17, 1981 until May 21, 1981, or until 45 days after EEOC has provided full answers to Shell's first interrogatories. Since the hearing on the order to show cause was held on May 15, 1981 in this Court, the motion for continuance is denied as moot.

EEOC's Motion For Reconsideration.

EEOC moves the Court to reconsider its order of March 6, 1981 denying defendant's motion to dismiss civil action No. 80-1202C(5). The grounds for the motion for reconsideration are:

1. Denial of the motion to dismiss and allowance of discovery by plaintiff will affirmatively harm the ability of the EEOC to carry out its mandate under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*
2. This is simply a motion to quash a subpoena and as such is a summary proceeding.
3. The recent amendment to the Federal Reports Act clarifies Congressional intent not to include investigatory material within the Act's coverage.

In order to systematically approach the present motion for reconsideration, the Court will analyze the original motion to dismiss on an issue by issue basis.

EEOC's first argument is that the Court lacks subject matter jurisdiction. This action is brought under U.S. Const. amend. V; the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*; the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*; the Federal Reports Act, 44 U.S.C. §§ 1331, 1337, 1391(e), and 1651. 28 U.S.C. § 1331 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. Since the instant matter arises under an amendment of the United States Constitution and several United States laws, this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

Defendant next argues that plaintiff has failed to state a claim upon which relief can be granted under Fed.R. Civ. P. 12(b)(6). This contention is argued via four subsections entitled: A. Federal Reports Act, B. Confidentiality, C. There is Sufficient Justification For Issuance of a Commissioner Charge, and D. The Subpoena Should Not Be Quashed.

A. Federal Reports Act.

Shell asserts in Counts IV and V of the complaint that the information sought by the EEOC from Shell in its subpoena and October 1979 Request for Information

was requested in violation of the Federal Reports Act, 44 U.S.C. § 3501, *et seq.* It has come to the Court's attention that the Federal Reports Act has been replaced by the Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat. 2812, which became effective April 1, 1981. This Act indicates that it does not apply to the collection of information during the conduct of an administrative investigation of specific entities and that it is not intended to interfere with civil rights enforcement. Here, the EEOC was seeking information while conducting an administrative investigation of Shell, a specific entity. Therefore, EEOC's motion to dismiss is granted as to the claim under the Federal Reports Act, now the Paperwork Reduction Act of 1980. Accordingly, EEOC's motion to reconsider is granted as to the Federal Reports Act claim.

B. Confidentiality.

In Count VI Shell alleges that EEOC frequently retains outside consultants to review investigatory materials, particularly computer data, and in so doing, EEOC provides these consultants with a charged employer's company documents and computer records. Furthermore, Shell claims that this practice violates 42 U.S.C. §§ 2000e-5(b) and 2000e-8(c) and the Trade Secrets Act, 18 U.S.C. § 1905. Lastly, Shell states that the EEOC has refused to give it any assurance that it will not provide the information demanded to outside consultants, and EEOC has asserted a right to do so. To the contrary, the EEOC at the show cause hearing on May 15, 1981, intimated that the subpoena could be enforced with a stipulation that the information not be turned over to outside consultants. Transcript of Hearing, p. 26, lines 9-12. Since EEOC has indicated a willingness not to turn over the information requested to outside consultants, EEOC's motion to dismiss is granted as to this issue.

C. There Is Sufficient Justification For Issuance of a Commissioner's Charge.

Plaintiff alleges via complaint that the Commissioner's charge issued against it does not specify sufficient facts, that it exceeds the Commission's statutory authority, and that plaintiff's due process rights are violated in that it cannot defend itself against the allegations in the charge.

The Commissioner's charge reads:

COMMISSIONER'S CHARGE

Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. (Supp. v. 1975) I charge the following employer with unlawful employment practices:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.
2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, profession-

al, technical, craft, operative, laborer and service worker positions because of their sex.

The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein.

Title 42 U.S.C. § 2000e-5(b) in relevant part provides:

> (b) Whenever a *charge* is filed by or on behalf of a person claiming to be aggrieved, or by a *member of the Commission*, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the *Commission shall serve a notice of the charge* (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.* Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment

> practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge. (Emphasis supplied.)

The language of the statute clearly indicates that the Commissioner had the authority to issue a charge. Therefore, plaintiff's argument that the Commissioner's charge exceeds the Commission's statutory authority is without merit.

Plaintiff's allegation that the Commissioner's charge does not specify sufficient facts is also meritless. The purpose of a charge under section 706, 42 U.S.C. § 2000e-5, is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. *Graniteville Co. (Sibley Div.) v. Equal Employ. Op. Com'n.*, 438 F.2d 32, 38 (4th Cir. 1971). A showing of resonable cause via facts, in order to find a Title VII violation need not be established before an administrative subpoena may be validly issued. *See Equal Employment Opportunity Commission v. Chrysler Corporation*, 567 F.2d 754, 755 (8th Cir. 1977). Rather, it is the function of such investigative subpoenas to establish whether reasonable cause to bring a discrimination charge exists. *Chrysler Corporation*, 567 F.2d at 755; *Graniteville Co.*, 438 F.2d at 36. 29 C.F.R.

§ 1601.12(b)(1980), which applies to charges filed by aggrieved persons and the Commission, states that a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. According to this standard, the Commissioner's charge is sufficient, because it is a typewritten statement which identifies the parties involved as being Shell Oil Company and the EEOC, and it describes generally the practices complained of as failing or refusing to recruit, hire, promote, train, assign or select Blacks and/or females for managerial, professional, technical, craft, and service worker positions, *inter alia*, because of their race and/or sex. *See* Commission's Charge, paragraphs 1 and 2.

As per 42 U.S.C. § 2000e-5(b), only *notice* of the charge must include the date, place and circumstances of the alleged unlawful employment practice. The rule only requires that charges be in writing under oath or affirmation and contain such information and be in such form as the Commission requires. Here, the charge was type-written, sworn to by Commissioner Norton, and substantially complied with Commission guidelines.

Similarly, it is difficult to fathom plaintiff's argument that its U.S. Const amend. V due process rights are violated in that it cannot defend itself against the allegations in the charge. In nonadjudicative, fact-finding investigations, traditional notions of U.S. Const. amend. V due process do not attach. *See Hannah v. Larche*, 363 U.S. 420, 446, 80 S.Ct. 1502, 1516, 4 L.Ed. 2d 1307 (1959); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598, 70 S.Ct. 870, 872, 94 L.Ed. 1088 (1949). In the present case, EEOC is seeking to make a nonadjudicative investigation, therefore, due process under U.S. Const. amend. V is inapplicable.

Based on the foregoing, there is sufficient justification for issuance of the Commissioner's charge and EEOC's motion to dismiss is granted as to this issue.

D. The Subpoena Shouuld Not Be Quashed.

Plaintiff alleges that the suboena should be quashed, because the information sought is irrelevant.

It is clear that the EEOC has the authority to make investigations in order to determine if individual and/or pattern or practice discrimination is ongoing. *See* 42 U.S.C. §§ 2000e-5(b) and 2000e-6(e). 42 U.S.C. § 2000e-8(a) states that the Commission or its designated representative shall have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices and is *relevant* to the charge under investigation. Notions of relevancy at the investigatory stage are very broad, and so long as the EEOC is not wandering into wholly unrelated areas, the EEOC has the power to investigate and thus to subpoena documents concerning any employer practice which may shed light on the discrimination charged. *Equal Employment Opportunity v. Cambridge Title Mfg.*, 590 F.2d 205, 206 (6th Cir. 1979). The Court after reviewing the subpoena finds that the information requested therein is not wholly unrelated to the charge under investigation. Therefore, the information requested is relevant and the subpoena should not be quashed.

Additionally, plaintiff complains that it would be unduly burdensome to produce the information requested, to provide compilations and to provide computer information. The fact of being burdensome alone is not a sufficient basis for refusal to enforce a subpoena. 42 U.S.C. § 2000e-8(a) places no limitations on the Commission's access to materials on the basis of the burden to the company. *EEOC v. United States Fid. & Guar.*

Co., 414 F. Supp. 227, 244 (D. Md. 1976), *aff'd*, 538 F.2d 324 (4th Cir. 1976). Therefore, plaintiff's argument appears to have minimal merit.

After careful reconsideration of the EEOC's motion to dismiss, the Court finds that the motion to dismiss cause No. 80-1202-C(5) has merit. Therefore, the Court vocates its order denying EEOC's motion to dismiss dated March 6, 1981, and in lieu thereof grants EEOC's motion for reconsideration.

Shell Motion To Enforce Stipulation.

Shell moves to enforce a stipulation entered between Shell and the EEOC which was filed on January 12, 1981. The relevant portion of the stipulation provides that in the event the defendants' (EEOC, et al.) motion to dismiss is denied, defendants agree to answer or object within 30 days of such denial, plaintiff's first interrogatories filed on November 24, 1980. After the motion to dismiss was originally denied by the Court, defendants failed to answer or object to plaintiff's interrogatories. Instead, defendants filed a motion to reconsider their motion to dismiss. The Court has now granted the motion to reconsider. Since defendant's original motion to dismiss has in effect been granted via motion for reconsideration, defendants are not required to answer or object to plaintiff's first interrogatories within 30 days of this Court's order, as per the stipulation. Accordingly, Shell's motion to enforce the stipulation is denied.

Defendants' (EEOC, et al.) Motion for Protective Order.

Defendants (EEOC, et al.) in cause No. 80-1202-C(5) moved for a protective order staying all discovery in that case pending a ruling on defendants' motion for reconsideration. In that the motion for reconsideration has been ruled on by the Court, defendants' motion is denied as moot.

IT IS SO ORDERED.

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is entered for the EEOC in civil action No. 80-1202-C(5), Shell's action to quash the subpoena.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is entered for the EEOC in civil action No. 81-0230-C(5), EEOC's action to enforce the subpoena.

MEMORANDUM

On Motion For Reconsideration and Clarification

This matter is before the Court upon the Equal Employment Opportunity Commission's (hereafter EEOC) motion for reconsideration and clarification and Shell Oil Company's (hereinafter Shell) cross-motion for clarification.

On September 27, 1979, Eleanor Holmes Norton, Chair of the EEOC, initiated a Commissioner's charge against Shell under Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The charge alleged employment discrimination on the basis of race and sex at plaintiff's refinery in Wood River, Illinois. Subsequently, W. Ed. Mansfield, District Director of the St. Louis District Office of the EEOC, issued the EEOC's first request for information. An administrative subpoena duces tecum was served on Shell May 16, 1980 by Mansfield. In response thereto, on May 23, 1980, Shell filed a petition to revoke or modify the subopena, which was denied by Mansfield on June 9, 1980. Shell filed an appeal of the petition to revoke or modify the subpoena on June 23, 1980. Likewise, Shell's appeal was denied by Leroy Clark, General Counsel of the EEOC, around August 27, 1980. Having exhausted its administrative remedies, Shell filed an action in this Court [No.

80-1202-C(5)] in order to quash the subpoena and to enjoin the EEOC, Norton, Clark, and Mansfield from their alleged unlawful and arbitrary course of conduct. Around February 4, 1981, the EEOC filed an action in the Southern District of Illinois [now No. 81-0230-C(5)] against Shell and its agent, Roger Rice, to enforce the subpoena duces tecum issued by the EEOC. The actions were consolidated and brought before this Court. Thereafter the EEOC moved to dismiss civil action No. 80-1202-C(5). The Court denied EEOC's motion to dismiss via its order of March 6, 1981. EEOC then filed other pretrial motions and a motion for reconsideration of the Court's order of March 6, 1981. The Court in its order dated June 30, 1981, granted, *inter alia*, EEOC's motion for reconsideration.

EEOC now moves for reconsideration of those portions of the June 30, 1981 order denying its motions for a protective order and to strike defenses. Both parties move for clarification of the Court's order of June 30, 1981.

In reconsideration and clarification of the Court's order of June 30, 1981, for the reasons outlined in the Court's memorandum (pp. 5-11) of June 30, 1981, civil action No. 80-1202-C(5), Shell's action to quash the subpoena is dismissed. Therefore, judgment in civil action No. 80-1202-C(5) is entered for the EEOC. After careful consideration of Shell's arguments, defenses, and memoranda explaining why the subpoena should not be enforced which were presented at the show cause hearing and in the pleadings, the Court enters judgment for EEOC in civil action No. 81-0230-C(5), EEOC's action to enforce the subpoena.

In addition to the rationale set out on pages 5-11 of the Court's order of June 30, 1981, the Court finds that the subpoenaed information is material and relevant to the EEOC's investigation. *See Equal Employment Opportunity Commission v. Chrysler Corporation*, 567

F.2d 754, 755 (8th Cir. 1977); *Equal Emp. Op. Com'n v. University of N.M., Albuquerque*, 504 F.2d 1296, 1301 (10th Cir. 1974). Although compliance with the subpoena may place somewhat of a burden on Shell, burdensomeness alone is not a sufficient basis for refusal to enforce a subpoena. *EEOC v. Unites States Fid. & Guar. Co.*, 414 F.Supp. 227, 244 (D.Md.1976). Any inconvenience or difficulty must be considered as a part of the social burden of living under government. *Id.* at 244. In order to alleviate some of the burden and expense of compliance, the EEOC previously assured Shell that it (EEOC) is authorized to contribute toward the costs of compliance. (*See* Determination On Appeal Petition, paragraph 3.)

Additionally, the subpoena is not subject to quashing because it requires Shell to make certain compilations. *See New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160, 164 (5th Cir. 1975); *Okla. Pub. Co. v. Powell*, 22 FEP Cases 1421, 1425 (W.D.Okla.1976), *aff'd, Okla. Pub. Co. v. EEOC*, 22 FEP Cases 1429 (10th Cir. 1978), *cert. denied*, 439 U.S. 863, 99 S.Ct. 186, 58 L.Ed.2d 173 (1978).

The EEOC, however, cannot require Shell to furnish *copies* of documents. *See Okla. Pub. Co.*, 22 FEP Cases at 1425-26. 42 U.S.C. § 2000e-8(a) provides:

> (a) In connection with any investigation of a charge filed under section *2000e-5* of this title, the Commission or its designated representative shall at all reasonable times have *access to*, for the purpose of examination, and the *right to copy* any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation. (Emphasis supplied.)

Accordingly, the subpoena, to the extent that it seeks copies to be supplied by Shell, is modified and is en-

forceable only to the extent access to and the right to copy evidence is sought.

Therefore, Shell shall comply with the subpoena as modified in connection with the investigation of the charge filed by Eleanor Holmes Norton by allowing EEOC representatives access to the subpoenaed documents and information commencing no later than October 23, 1981, and continuing until production is completed. The information obtained by the EEOC, however, shall not be turned over to any outside consultants. In that this ruling disposes of this consolidated action because it disposes of both civil action No. 80-1202-C(5) and No. 81-0230-C(5), the Court finds there is no longer a need for Shell's discovery. Therefore, EEOC's motions for protective order that discovery not be had and to strike defenses are denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1981

Filed April 23, 1982

No. 81-1811

SHELL OIL COMPANY, APPELLANT,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL APPELLEES.

* * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE,

v.

SHELL OIL COMPANY, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

JUDGMENT

This appeal from the United States District Court for the Eastern District of Missouri was considered on a designated record from the United States District Court and on the briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that this cause be and is hereby, remanded to the said

District Court for proceedings consistent with the opinion of this Court.

APRIL 28, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1811

SHELL OIL COMPANY, APPELLANT,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ELEANOR HOLMES NORTON, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LEROY CLARK, GENERAL COUNSEL, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; W. ED MANSFIELD, DISTRICT DIRECTOR, ST. LOUIS DISTRICT OFFICE, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEES.

ORDER DENYING PETITION FOR REHEARING EN BANC

FILED: July 20, 1982

The petition for rehearing en banc in the above entitled case is denied.

Lay, Chief Judge, would grant the petition for rehearing en banc.

I must respectfully dissent from denial of the petition for rehearing en banc because I believe that the panel's opinion is inconsistent with this court's holding in *EEOC v. Chrysler Corp.*, 567 F.2d 754 (8th Cir. 1977),

and in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a title VII charge. Because the panel's decision goes far beyond any other court of appeals in requiring detailed pleadings to support an administrative subpoena, and because of the profound impact that such a holding will necessarily have on the EEOC's pattern and practice enforcement program, I believe that a review of the case en banc is warranted.

The panel's decision holds that a charge filed by the chair of the Equal Employment Opportunity Commission against Shell Oil Co. pursuant to sections 706 and 707 of title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5 and 2000e–6, fails to set forth sufficient facts regarding the dates and circumstances of the alleged unlawful employment practices as required by section 706(b) of title VII, 42 U.S.C. § 2000e–5(b). *See Shell Oil Co. v. United States EEOC*, No. 81-1811, slip op. at 9 (8th Cir. April 28, 1982, amended July 20, 1982). Thus, the panel concludes, the charge is insufficient to support the EEOC's subpoena requiring Shell to produce certain evidence described in the Request for Information covering the period from 1976 to the present. *Id.* at 2-3. The cause was subsequently remanded to the district court to allow the EEOC an opportunity to amend the charge to comply with section 706(b). *Id.* at 9.

The disputed charge is as follows:

> Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq, (supp v. 1975) I charge the following employer with unlawful employment practices:
>
> Shell Oil Company
> Wood River Refinery
> P.O. Box 262
> Wood River, Illinois 62095

> I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.
>
> More specifically, the employer's unlawful discriminatory practices include, but are not limited to:
>
> 1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.
>
> 2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex.
>
> The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein.

The panel found fatal to this charge the fact that the EEOC used July 2, 1965, the effective date of the title VII, as the beginning date of Shell's title VII violation. Use of such a date, the panel concludes, fails to notify Shell of the parameters of the investigation because the charge contains no factual basis in the allegations supporting that date. *Id.* at 7-8. The panel additionally faulted the charge, stating:

> Adequate notice of the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations. 29 C.F.R. § 1602.14(a) (1981). A charge which simply alleges discrimination in all areas of employment

practice without some factual or statistical basis gives the appearance of a "fishing expedition" and fails to give the employer sufficient notice. *Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971).

Id. at 8.

In *EEOC v. Chrysler Corp.*, 567 F.2d 754 (8th Cir. 1977), this court upheld the district court's order enforcing the EEOC's subpoena duces tecum stating:

> Reasonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued. Rather, it is the function of such investigative subpoenas to establish whether reasonable cause to bring a discrimination charge exists. *See EEOC v. Quick Shop Markets, Inc.*, 526 F.2d 802, 803 (8th Cir. 1975); *Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971). Thus, a court faced with a demand for enforcement is limited to determining whether the subpoenaed information is material and relevant to the investigation of a potential violation. To do otherwise would be to "not only place the cart before the horse, but to substitute a different driver for the one appointed by Congress." *Graniteville Co. (Sibley Div.) v. EEOC*, *supra* at 36. *See also EEOC v. South Carolina National Bank*, 562 F.2d 329, at 331-332 (4th Cir., filed Sept. 28, 1977); K. Davis, Administrative Law Text 63-66 (3d ed. 1972).
>
> The district court properly exercised its limited review of the relevance and materiality of the subpoena in ordering its enforcement. *See EEOC v. Quick Shop Markets, Inc.*, *supra* at 803. Those issues relating to the existence of reasonable cause for finding a violation of Title VII must await the completion of the administrative process before the district court may properly review them. *Cf. Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, at 668 (4th Cir., filed Oct. 14, 1977). By allowing the administrative process to be completed the issues

> may well be disposed of without the necessity of federal court action. The defendant's contentions are premature.

567 F.2d at 755.

Accord EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 312–13 (7th Cir. 1981); *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1338 and n.3 (9th Cir. 1980). Other courts have also read section 706 to require no detailed factual pleading, and have permitted charges similar to those in the instant case. *See, e.g., New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160, 162-64 (5th Cir. 1975) (statistics alleged in charge of discriminatory pattern and practice; the court in dicta inferred that charge would have been sufficient even without statistical allegations); *Sparton Southwest, Inc.* v. *EEOC*, 461 F.2d 1055, 1058-60 (10th Cir. 1972) (en banc) (subpoena based on similar charge upheld); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783, 783-84 (7th Cir. 1971); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799, 800-01 (6th Cir.), *cert. denied*, 400 U.S. 942 (1970).

It would appear that the panel decision would require the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause. Furthermore, the court's decision would impose the pleading standards of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 8, upon an administrative fact-finding investigation. Such a position is supported by neither logic nor precedent, and would severely undermine the Commission's ability to bring commissioner's charges of discriminatory patterns and practices as authorized under 42 U.S.C. § 2000e-5[.] For these reasons, a rehearing of this action by this court en banc is in order.

A true copy.

Attest:

CLERK, *U.S. Court of Appeals, Eighth Circuit.*

APPENDIX E

EEOC Compliance Manual (CCH 1982)

SECTION 16
PROCESSING SYSTEMIC CASES

16.2 *Standards for Selecting Systemic Respondents*—The Commission has approved the following standards for the selection of subjects for systemic inquiry. It shall be sufficient for the Commission to institute a systemic proceeding that a respondent meet one of the standards for selection. These standards are for internal guidance in the exercise of administrative discretion and do not create rights on the part of any person who may become a subject of a systemic proceeding, or any obligation on the part of the Commission to proceed against any particular person. These standards do not foreclose the Commission from instituting systemic proceedings against any other employer or other persons subject to Title VII whose acts or practices are such that a systemic proceeding will effect the purpose of Title VII.

(a) Employers or other persons subject to Title VII who continue in effect policies and practices which result in low utilization of available minorities and/or women despite the clear obligation in Title VII to fairly recruit, hire and promote such persons.

(b) Employers or other persons subject to Title VII who employ a substantially smaller proportion of minorities and/or women than other employers in the same labor market who employ persons with the same general level of skills.

(c) Employers or other persons subject to Title VII who employ a substantially smaller proportion of minorities and/or women in their higher paid job categories than in their lower paid job categories.

(d) Employers or other persons subject to Title VII who maintain specific recruitment, hiring, job assignment, promotion, discharge, and other policies and practices relating to the terms and conditions of employment that have an adverse impact on minorities and/or women, and are not justified by business necessity. Such policies and practices may include, but are not limited to, those prohibited in Commission Guidelines on Sex Discrimination, 29 C.F.R. 1604, Religious Discrimination, 29 C.F.R. 1605, and National Origin Discrimination, 29 C.F.R. 1606; the Guidelines on Employee Selection Procedures, 29 C.F.R. 1607; and other guidelines as they may be adopted and amended from time to time.

(e) Employers or others subject to Title VII whose employment practices have had the effect of restricting or excluding available minorities and/or women from significant employment opportunities, and who are likely to be used as models for other employers because of such factors as the number of their employees, their impact on the local economy, or their competitive position in the industry.

(f) Employers (a) who because of expanding employment or significant turnover rates, even if the employer's enforcement is stable or in retrenchment, are likely to have substantial numbers of employment opportunities, and (b) whose practices may not provide available minorities and women with fair access to these opportunities.

16.3 *Procedure for Selecting Systemic Respondents*

(a) *Preliminary Screening by Headquarters*—Headquarters OSP will develop a list of potential systemic respondents for each of the Commission's Systemic Units. This will be done by applying the Commission's systemic selection standards to an analysis of

EEO reporting data and other available information. Systemic inquiries recommended by Commissioners or requested by individuals and organizations will also be considered during this preliminary stage.

(b) *Requests for Systemic Inquiries From the Public*—Any person or organization may request the issuance of a Commissioner Charge pursuant to Section 1601.6 of the Procedural Regulations. When such a request relates to systemic discrimination, it will be forwarded for evaluation to OSP. The request will then be evaluated in terms of the standards established by the Commission for selecting systemic respondents.

(c) *Analysis by Systemic Units*—The Investigations Division, OSP, and District Office Systemic Units will conduct a careful analysis of the preliminary lists developed for them by Headquarters. This analysis will normally include review of information available both within the Office (e.g., charge files) and from outside sources (e.g., federal contract compliance agencies). The Systemic Units will make recommendations for selections to the Top Management Committee (TMC). See 12.2 for description of membership and responsibilities of the TMC.

The Systemic Units may also analyze other potential respondents not appearing on the preliminary list, including potential respondents named in requests by the public for systemic inquiries, which in their judgment warrant consideration. Systemic Units may recommend the selection of a respondent which does not appear on the OSP preliminary list to the TMC. Such recommendations must conform to the Commission's systemic selection policy as interpreted by the Director, OSP.

The TMC is encouraged to submit to OSP for preliminary analysis any non-listed respondents they are considering.

(d) *Transmittal of Recommendations to the Director, OSP*—Top Management Committees and the Di-

rector of Investigations, OSP, will transmit to the Director, OSP, their recommendations for the issuance of systemic Commissioner Charges. Each recommendation shall be accompanied by both a Commissioner Charge ready for signature, and a memorandum detailing information concerning respondent's practices, the reasons for selecting the respondent (including a showing that at least one of the systemic selection standards applies to the respondent), and a description and justification of the proposed scope of the case.

(e) *Review and Approval by Headquarters*—The Director, OSP, will review the Top Management Committees recommendation for field cases and the OSP Director of Investigations recommendations for headquarters cases, will coordinate with the Associate General Counsel, Trial Division, and will forward recommended Commissioner Charges with supporting data to the Commissioners on a rotating basis for signature.

(f) *Transmittal of the Charge for Processing*—When a systemic Commissioner Charge is signed by a Commissioner, the Director, OSP, will immediately transmit the charge to the appropriate Office for processing.

APPENDIX F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

072800036

COMMISSIONER'S CHARGE

Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq, (Supp v. 1975) I charge the following employer with unlawful employment practices:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.
2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex.

The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein.

District of Columbia, ss:

I, ELEANOR HOLMES NORTON, being duly sworn, depose and say that I am a Commissioner of the Equal Employment Opportunity Commission and that I have cause to believe that Shell Oil Company has committed the unlawful employment practices set forth in the foregoing charge.

/s/ _____
ELEANOR H. NORTON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th DAY OF SEPTEMBER 1979.

/s/ _____
CORA O. DIXON
Notary Public

My Commission expires September 14, 1981.

APPENDIX G

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

AMENDMENT TO COMMISSIONER CHARGE

On September 27, 1979, I signed a Commissioner charge against:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois

When I signed the charge I intended to cover all the unlawful employment practices identified therein occurring from July 2, 1965, continuing through at least the date of the charge, and I believe that the charge as written did cover that time period. Nevertheless, to clarify any possible ambiguity that may exist in view of the decision in *EEOC* v. *Dean Witter Co.*, 621 F.2d 1012 (9th Cir. 1980), I hereby amend the original charge, which is incorporated here by reference, to state that I have reason to believe that the named employer had engaged in the identified unalwful employment practices on a continuing basis from at least July 2, 1965, until the present.

I swear or affirm that I have read the above amendment and that it is true to the best of my knowledge, information and belief.

/s/ _____
ELEANOR H. NORTON
Commissioner

Subscribed and sworn to before me this 16th day of January, 1981.

/s/ SUSIE T. FOFHE
Notary Public

My Commission expires 31 October 1984

Office-Supreme Court, U.S.
FILED
MAY 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

STEVEN J. KILLWORTH, ESQ.
Shell Oil Company
One Shell Plaza,
P.O. Box 2463
Houston, Texas 77001
(713) 241-3937

PETITION FOR WRIT OF CERTIORARI FILED
NOVEMBER 16, 1982
CERTIORARI GRANTED FEBRUARY 22, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RELEVANT DOCKET ENTRIES
No. 81-1811
EIGHTH CIRCUIT

Date 1981	Filings—Proceedings	Filed
Aug 3	Docketed case	
Aug 3	Certified copies notice of appeal; docket entries; Memorandum; Order rec'd from D.C.	(1)
Aug 3	BRIEFING SCHEDULE: DR aplnt due 8/13/81, DR aplee due 8/24/81, DR to be filed by D.C. by 9/3/81, tr. due 9/2/81, brief aplnt due 9/14/81, brief aplee due 10/14/81.	
Aug. 10	APPEARANCE for appellant.	(2)
Aug. 10	APPEARANCE for appellant.	(3)
Aug 6	LAW CLERK MEMO attached to screening report	
Aug. 21	MOTION aplnts ext of time to file opening brief.	(4)
Aug. 24	APPEARANCE for appellee.	(5)
Aug. 24	To Settlement Conference (To T.G.) 8/24/81.	
Aug. 31	ORDER: Aplnt's ("Shell") motion is granted in part in that aplnt may have to and incl. 9/28/81, in which to serve and file opening brief.	(6)
Sept. 8	ORDER: Case is remanded to District Court for ruling on appellant's pending Motion for Clarification of District Court's memo. and order of June 30, 1981, in No. 80-1202-C(5). This Court retains jurisdiction pending remand.	(7)
Sept. 30	DISTRICT COURT JUDGMENT rec'd: Judgment entered for EEOC in 80-1202C(5), Shell's action to quash the subpoena. Judgment entered for EEOC in 81-0230C(5), EEOC's action to enforce the subpoena	(8)
Oct. 14	CERTIFIED COPIES *NOTICE OF APPEAL*; docket entries; Judgment; Order; Memorandum rec'd from District Court	(9)
Oct. 14	TO SETTLEMENT CONFERENCE—Not suitable for conference. 10/27/81.	
Oct. 16	MOTION aplnt. ext of time to file opening brief.	(10)
Oct. 26	Shell Oil Company will proceed on a D/R.	
Oct. 26	Rec d copy of aplnt's designation of record.	
Nov. 9	ORDER: Appellant may have to and including November 24, 1981, in which to serve and file opening brief.	(11)

Nov. 24	*Brief Appellant* w/ser. 11/24 7 copies	(12)
Dec. 14	BRIEFING SCHEDULE: Brief aplee/cr. aplnt due 12/24/81, reply brief aplnt/cr. aplee due 1/28/82, reply brief aplee/cr. aplnt due 2/11/82, with 2355.	
11/16/81	THREE copies D.R., ONE Vol. Transcript of Hearing. Retd to Dist. Ct. 8/4/82	
Dec. 28	Motion for extension of time to file brief of appellee.	(13)
1982		
Jan. 12	On request of counsel for appellees, appellees have thru 1/12/82 to file brief; appellant has thru 1/28/82 to file reply brief.	(14)
10/26/81	Certificate of pecuniary interest ... original.....	(15)
Jan 25	*Brief Respondent* w/ser. 7 copies	(16)
Jan 25	Received 3 copies of Supreme Ct. Dec. from appellee for the Court	
Jan 27	To Screening 30 min.	
Jan. 28	MOTION aplnt ext of time to file reply brief.	(17)
Feb. 9	ORDER: Aplnt may have to and including 2/16/82 to file reply brf.	(18)
Feb 17	Transferrred to March session.	(19)
Feb. 19	*Reply Brf for Aplnt*	(19)
Mar. 11	ARGUED AND SUBMITTED to Judges Ross, Gibson and McMillian. Martin D. Schneiderman for aplnt. Lorraine C. Davis, for aplees. REBUTTAL: By Mr. Schneiderman. RECORDED	
APR 28	OPINION BY ROSS (PUBLISHED) (676 F.2d 322)	(20)
Apr 28	JUDGMENT: CAUSE remanded to District Court for proceedings consistent with this Court's opinion.	(21)
May 12	MOTION appellant for enlargement of time in which to file petition for reharing. (w/service)	(22)
May 12	APPELLANT's BILL of costs—with service.	(23)
May 14	ORDER: Appellant may have to & including May 27, 1982 in which to serve & file petition for rehearing.	(24)
May 24	APPELLEES' OBJECTION to appellant's bill of costs—w/service.	(25)
May 27	APPELLEE's PETITION for rehearing with suggestions for rehearing en banc. (w/service & statement)	(26)

May 28	ORDER: Court's order of May 14, 1982 should be amended to read "appellees", in lieu of "appellant", may have to & including May 27, 1982, etc.	(27)
July 20	ORDER: Petition for rehearing en banc is denied with Judge Lay's dissent. (Published) Dissent Lay 689 F.2d 757	(28)
July 20	ORDER: Opinion filed 4/28/82 is modified with substitution of pages 7, 8, & 9, attached to order (PUBLISHED)	(29)
Aug. 4	MANDATE ISSUED.	
Aug. 17	ORDER: APPELLANT will recover the sum of $2,250.15 for costs for appellee.	(30)
Oct. 18	LETTER from Clerk of Supreme Ct. advising that an extension of time to file petition for writ of certiorari has been granted by Mr. Justice Blackmun to and including Nov. 17, 11982.	(31)
Nov 22	NOTICE OF FILING of Petition for Writ of Certiorari to the Supreme Ct as case no. 82-825 as of Nov. 16, 1982.	(32)
1983		
Feb. 28	ORDER of Supreme Court of U.S. granting certiorari in case no. 82-825, as of Feb. 22, 1983.	(33)

RELEVANT DOCKET ENTRIES
CIVIL NO. 81-5020
SOUTHERN DISTRICT OF ILLINOIS

Date	NR	Proceedings 81-5020
1981		
2/4		APPLICATION for Order to Show Cause Why a Subpoena Should Not Be Enforced by Pltf. with MEMORANDUM in Support and AFFIDAVIT of W. Ed Mansfield J.S. No. 44 ORDER (WLB) to Show Cause. IT IS ORDERED that Respondents Shell Oil Company and Roger Rice appear on the 27th day of February, 1981, at 9:30, in the Court room, United States Courthouse, Alton, Illinois, and show cause why they should not be compelled to comply with the subpoena issued to them. IT IS FURTHER ORDERED that Shell Oil Company and Roger Rice be served with a copy of the show cause order, and the application upon which it was based, on or before the 9th day of February, 1981. IT IS FURTHER ORDERED that Shell Oil Company and Roger Rice must file and serve their answer to the application not later than the 20th day of February, 1981. DATED: February 4, 1981. Service papers with application and order to show cause sent to USM this date for service upon the two named defts.
2/9		Marshal's RETURN OF SERVICE on Roger Rice, Administrative Superintendent, Shell Oil Company, returned unexecuted.
2/12		Marshal's RETURN OF SERVICE on Shell Oil Company by serving C. T. Corporation, c/o Bonnie Harmon, Clerk, on 2/6/81.
2/20		MOTION to transfer (Shell) and proposed order, with BRIEF in Support
2/27		ORDER (WLB)... IT IS HEREBY ORDERED, that the motion of Shell Oil to transfer be, and the same is hereby GRANTED; and it is further ORDERED that this civil action be, and the same is, hereby transferred to the U.S. District Court for the Eastern District of Missouri; and it is further ORDERED that the response of Shell Oil Company to the application of EEOC herein shall be due ten days after the date of this Order. DATED: 2/27/81. Copies to all parties.

Case transferred to U.S. District Court for the Eastern District of Missouri this date (entire file, certified copy of transfer order, and certified copy of docket entries sent).

CASE CLOSED.

RELEVANT DOCKET ENTRIES
CONSOLIDATED CIVIL Nos. 80-1202C(5) AND 81-230C(5)
EASTERN DISTRICT OF MISSOURI

Date	NR.	Proceedings
9/18/80		COMPLAINT, 8 Counts, Non Jury, summons issued 60 days on all defts fld.
9/23/80		RETURN OF SUMMONS executed on W. Ed Mansfield, District Director, St. Louis dist. Office, USEEOC by serving Connie Wolf (sec) 9/22/80
9/26/80		RETURN OF SUMMONS executed on Robert D. Kingsland 9/23/80. 2 copies to atty. General cert. mail 9-19-80.
10/2/80		RETURN OF SUMMONS executed on U.S, Equal Employment Opportunity Commission by cert. mail by serving D. Smith 9/24/80.
10/2/80		RETURN OF SUMMONS executed on Eleanor Holmes Norton, Chairman, U.S. Equal Employment Opportunity Commission by cert. mail by serving J. Salcedo 9/23/80. fld.
10/22/80		RETURN OF SUMMONS executed on Leroy Clark, General Counsel, U.S.E.E.O.C. 9/19/80. by certified mail.
11/24/80		FIRST INTERROGS (17) to Deft. Equal Employment Opportunity Commission fld. by Pltff. Shell Oil Co.
11/24/80		FIRST REQUEST To Inspect and Copy Documents pursuant to Federal Rule 34 fld. by Pltff. Shell Oil Co.
12/2/80		ENTRY OF APPEARANCE—of Dianna B. Johnston for defts. fld.
12/2/80		MOTION to Dismiss fld. by defts. w/Memorandum in support.
12/4/80		MOTION for an enlargement of time in which to respond to deft's Motion to Dismiss. fld. by pltff.
12/4/80		STIPULATION—that time within which pltff must respond to deft's Motion to Dismiss is enlarged from Friday, Dec. 5, 1980, until and including January 6, 1981. So ordered (JHM).
12/29/80		MOTION for Protective Order w/memorandum of law in support and proposed Order fld. by defts.

1/5/81	EXTENSION OF TIME—pltff granted thru 1/13/81 to file its response to defts' Motion for a protective order. (CSC)
**	1/7/81 Motion of 12/2/80 and file delivered to Judge Cahill.
**	
1/6/81	OPPOSITION to defts' Motion to Dismiss fld. by Shell Oil Co. pltff. w/attachments.
1/9/81	SUPPLEMENTAL MEMORANDUM of Law in support of Deft's Motion to Dismiss fld. by defts.
1/12/81	STIPULATIONS—pltff. does not oppose defts' mtn for protective order staying discovery in case until ct. has ruled on defts' mtn. to Dismiss. In event that defts' mtn to dismiss is denied, defts agree to answer or object within 30 days of such denial. pltff's first interrogs filed Nov. 24, 1980. fld. by both parties. So Ordered (CSC). cc: attys.
1/13/81	EXTENSION OF TIME—pltff. requests an additional (10) days to and including 1/22/81 to file a response to deft's Supplemental Memorandum in Support of its Motion to Dismiss. So Ordered (CSC). fld.
1/13/81	MEMO FOR CLERK—Deft notifies the Court that it intends to respond by Feb. 6, 1981 to pltff's 1/6/81 opposition to deft's Mtn. to Dismiss. Pltff has been notified of deft's intention and does not oppose deft's intention to submit its response on or before 2/6/81/fld. by deft.
1/22/81	RESPONSE of Shell Oil Company to deft's supplemental memorandum of law in support of deft's Motion to Dismiss. fld.
2/6/81	DEFENDANT'S REPLY BRIEF—The Commission's Charge is Sufficient fld.
3/6/81	ORDER and MEMORANDUM (CSC) fld. Ordered that the motion to Dismiss of Deft. EEOC is DENIED. cc: attys.
3/9/81	MOTION for Consolidation w/memorandum in support and proposed order fld. by pltff. Shell Oil Co.
	3/16/81 Motion of 3/9/81 and file delivered to Judge Cahill.
3/16/81	ORDER (HKW) Upon consideration of motion of pltf/Respondent, Shell Oil Company, for consolidation of Cause #81-230(1) with #80-1202C (5), ORDERED that said causes are consolidated. Cause #81-230C(1) is consolidated with prior-filed Cause #80-1202C (5) and for all purposes is assigned to the same docket as was the prior-filed action. cc: attys.

3/16/81 CAUSE #81-230C (1) TRANSFERRED from Court #1, pursuant to above ORDER.

3/19/81 ORDER TO SHOW CAUSE (CSC) fld. Ordered that respondents Shell Oil Co. and Roger Rice appear on the 17th day of April, 1981, at 10:00 a.m. in the Courtroom of the Honorable Clyde S. Cahill, and show cause why they should not be compelled to comply with the subpoena issued to them. Further ordered that Shell Oil Co. and Roger Rice be served with a copy of the show cause order, on or before the 1st day of April, 1981. cc: attys.

4/1/81 MOTION to Strike defense w/suggestions in support of Motion of Applicant to strike defense fld. by applicant EEOC.

4/1/81 MOTION for Protective Order that discovery not be had w/memorandum in support. fld. by applicant EEOC.

4/3/81 MOTION For Continuance w/memo fld. by pltf.-respondent Shell Oil; REF._____

4/6/81 MEMO FOR CLERK—Shell Oil Co. is granted to 4/17/81 to respond to EEOC's Motion to Strkie [*sic*] and Motion for a protective order; SO ORDERED (CSC)

4/9/81 MEMORANDUM IN OPPOSITION TO RESPONDENT-PLTFF'S Motion for continuance. w/exhibit A. fld. by EEOC.

4/10/81 MOTION FOR RECONSIDERATION w/memorandum of law in support of motion for reconsideration w/attachment #1, fld. by deft. EEOC. w/proposed order.

4/10/81 MOTION of Shell Oil Company to enforce stipulation w/memorandum in support & proposed order fld. by Shell Oil Co.

4/10/81 MOTION for Protective Order w/memorandum in support & proposed order fld. by EEOC.

4/13/81 Motions of 4/1/81 and 4/3/81 delivered to Judge Cahill.

4/14/81 CAUSE #81-230C (5) Hearing Resetting—By order of ct, sua sponte, the hearing on the order to show cause in cause is removed from setting on Friday, April 17, 1981, and reset for FRIDAY, MAY 15, 1981, at 10:00 a.m. (CSC) fld. cc: attys.

4/14/81 EXTENSION OF TIME—Pltff, Shell Oil Co., is hereby granted up to and including April 24, 1981, to respond to defts' Motion for Protective Order and Motion to Reconsider. fld. (CSC) So Ordered.

4/17/81 OPPOSITION of Shell Oil Co. to Motion to strike defenses and Motion for Protective Order filed by Equal Employment Opportunity Commission in Civil Action No. 81-230C(5). fld.

4/21/81 Motions of 4/10/81 and file delivered to Judge Cahill.

4/23/81 OPPOSITION to Motion to Enforce Stipulation fld. by EEOC.

4/24/81 OPPOSITION of Shell Oil Co. to Motion for Reconsideration fld.

5/15/81 PARTIES PRESENT FOR HEARING ON ORDER TO SHOW CAUSE, DEFT'S EXHIBITS A THRU N ADMITTED INTO EVIDENCE, CAUSE ARGUED, HEARD AND TAKEN UNDER SUBMISSION.

5/15/81 SUPPL MEMORANDUM—On Disclosure To Outside Consultants, fld by Plff., Shell Oil

6/24/81 TRANSCRIPT—Of Hearing, fld by Court Report, located in case #81-230C(5)

6/30/81 ORDER & MEMORANDUM (CSC)—Fld., Ordered that the EEOC's Motion to Strike is DENIED. FURTHER ORDERED that the EEOC's Motion for Protective Order that discovery not be had is STAYED as to Shell's Interrogs #11-13, pending the filing of a certificate of privilege by the EEOC and DENIED as to Shell's Interrogs #1-10, 14-17, and Shell's First Request to Inspect and Copy Documents. FURTHER ORDERED that Shell's Motion for Continuance is DENIED AS MOOT. FURTHER ORDERED that the EEOC's Motion for reconsideration is GRANTED. FURTHER ORDERED that Shell's Motion to enforce the Stipulation is DENIED. FURTHER ORDERED that Defts' (EEOC, et al.) Motion for Protective Order is DENIED AS MOOT. cc: attys

7/20/81 MOTION—For Reconsideration and Clarification of Order of Court of June 30, 1981, W/Memorandum in Support, fld by the Deft., (ref_____)

7/28/81 CROSS-MOTION—For Clarification, W/Memorandum in Support and Proposed Order, fld by Plff., (ref_____)

7/29/81 NOTICE OF APPEAL fld. by pltff-deft Shell Oil Co. cc: attys. Judge Cahill. Dist Ct. & USCA8 fees pd. Copy of Notice of Appeal, Copy of Order & Memorandum filed 6/30/81 and 2 cert. Copies docket sheets delivered to USCA8 7/30/81. (80-1202C (5) consolidated with 81-230C (5).

7/31/81 Motion of 7/20/81 and file delivered to Judge Cahill.

8/10/81 CAUSE #81-230C (5) REPLY to Cross Motion for Clarification fld. by EEOC.

8/24/81 SUPPLEMENTAL MEMORANDUM of Shell Oil Co. in Opposition to EEOC's Motion to Dismiss, first Motion for Reconsideration, Motion to Strike defenses, and Second Motion for Reconsideration and clarafication [*Sic*] w/attachments fld.

9/9/81 ORDER—USCA. fld. This case is remanded to the District Court for the Limited purpose of having that Court rule on appellant's pending Motion for Clarification of the District Court's memorandum and order of June 30, 1981, in No. 80-1202C(5). This court retains jurisdiction pending remand. cc: attys.

9/17/81 REPLY of EEOC to supplemental memorandum of Shell Oil Co. in Opposition to EEOC's Motion to Dismiss, First Motion for Reconsideration, Motion to strike defenses, and Second Motion for Reconsideration and clarification fld.

9/22/81 JUDGMENT (CSC) fld. Ordered, Adjudged, and Decreed that judgment is entered for the EEOC in civil action No. 80-1202-C (5), Shell's action to quash the subpoena. Ordered, Adjudged, and Decreed that judgment is entered for the EEOC in civil action No. 81-230C (5), EEOC's action to enforce the subpoena. cc: attys.

9/22/81 ORDER AND MEMORANDUM (CSC) fld. Ordered that civil action No. 80-1202C (5), Shell's action to quash the subpoena, is DISMISSED. Further ORDERED that Shell shall comply with the subpoena issued it in connection with the investigation of the charge by allowing EEOC reps access to the subpoenaed documents and info to commencing no later than October 23, 1981, and continuing until production is completed. Ordered that EEOC may not turn over any of the info obtained via the subpoena to outside consultants. Further Ordered that EEOC's mtns for protective order that discovery not be had and to strike defenses are DENIED. cc: attys.

10/9/81 NOTICE OF APPEAL fld. by pltff-appellant. cc: attys, Judge Cahill. Dist. Ct. & USCA fees not required—USCA retains jurisdiction. Cert. Copy Notice of Appeal, copy of Judgment entered 9/22/81 and Order of 9/22/81, and 2 cert. copies docket sheets delivered to USCA8. 10/13/81.

10/9/81	MOTION for stay of enforcement Order pending Appeal and for approval of supersedeas Bond, w/memorandum of Shell Oil Co. in support & proposed Order. fld. by Shell Oil Co.
10/9/81	APPEAL BOND—LODGED. by Shell Oil Co.
10/13/81	PUBLISHED with West Publishing Co., Bureau of National Affairs and Lexis Opinion Collection Dept.—Order & Memorandum filed 6/30/81 and Judgment, Order and Memorandum filed 9/22/81.
10/19/81	MEMORANDUM OF POINTS AND AUTHORITIES in Opposition to Motion for Stay of enforcement pending Appeal fld. by EEOC.
" "	10/14/81 Motions of 10/9/81 and 10/13/81 and file delivered to Judge Cahill.
10/26/81	DESIGNATION OF CLERK'S RECORD AND STATEMENT OF ISSUES ON APPEAL fld. by appellant Shell Oil Co.
10/30/81	REPLY MEMORANDUM of Shell Oil Co. in support of Motion for stay of enforcement Order pending appeal w/attachments fld.
11/9/81	ORDER AND MEMORANDUM (CSC) fld. ORDERED that Shell's motion for stay of the enforcement order of September 22, 1981, pending appeal and for approval of a supersedes bond in the sum of $250.00 is GRANTED. cc: attys.
11/9/81	COUNTER DESIGNATION OF CLERK's RECORD ON APPEAL fld. by EEOC, (appellee)
11/16/81	DELIVERED TO USCA8.—One certified & 2 copies of designated record, 1 vol, transcript of hearing of 5/15/81.
11/24/81	MOTION for permission to file notice of appeal out of time fld. by EEOC. Notice of Appeal lodged. LEAVE to file Notice of Appeal Granted (CSC) 12/3/81.
12/3/81	**Motion of 11/24/81 and file delivered to Judge Cahill.**
12/3/81	**NOTICE OF APPEAL fld. by Pltff EEOC. cc: attys. U.S. Dist. Court & USCA fees not required.**
12/9/81	**DELIVERED TO USCA—Cert. copy Notice of Appeal, Copy of Order and Memorandum fld. 9/22/81 and 2 cert. copies docket sheets.**
3/2/81	**CAUSE TRANSFERRED FROM US DISTRICT COURT—SOUTHERN DISTRICT OF ILLINOIS (CAUSE #81-5020) *WITH ALL RELATED PAPERS*:** **Cause Filed on 2/4/81:**

APPLICATION for Order to Show Cause Why a Subpoena Should Not Be Enforced by Pltf, with MEMO in Support thereof & AFFIDAVIT

On 2/27/81—ORDER (WLB) Fld. HEREBY ORDERED that on motion of Shell Oil Co. to Transfer is GRANTED. Further Ordered that this cause be transferred to Eastern District of Missouri and *Further Ordered that the response of Shell Oil Company to the application of EEOC shall be due ten days after date of this Order* (cc: by Southern Dist. of Illinois)

3/2/81 LETTER transmitted to all counsel of record indicating our Cause No. and receipt of transfer, Fld. by Court *(Copy Only)

3/9/81 MOTION for Consolidation of actions 81-230-C(1) and 80-1202-C(5), Fld. by Pltf. (Ref_____)
MEMO In Support thereof, fld.
**ORIGINAL MOTION FILED WITH JUDGE CAHILL UNDER #80-1202-C(5)*

3/9/81 FIRST INTERROGS (17) by Respondent Shell Oil, Fld., Directed to EEOC

3/9/81 FIRST REQUEST for Production of Documents, Directed to EEOC, by Shell Oil, fld.

3/9/81 *ANSWER* to Application for Order to Show Cause Why a Subpoena Should Not be Enforced, by Respondent Shell Oil
OPPOSITION of Shell Oil to EEOC's Application for Order to Show Cause, Fld. W/ATTACHED APPENDIX

3/16/81 *ORDER* (HKW) Upon consideration of motion of Pltf Respondent, Shell Oil Company, for consolidation of Cause #81-230-C(1) with #80-1202-C(5), ORDERED that said causes are consolidated. Cause #81-230-C(1) is consolidated with prior-filed Cause #80-1202-C(5) and for all purposes is assigned to the same docket as was the prior-filed action. (cc: parties)

3/16/81 *Cause #81-230-C(1) TRANSFERRED to Court #5, pursuant to above Order*

3/19/81 ORDER TO SHOW CAUSE (CSC) fld. Ordered that respondents Shell Oil Co. and Roger Rice appear on the 17th day of April, 1981, at 10:00 a.m. in the Courtroom of the Honorable Clyde S. Cahill, and show cause why they should not be compelled to comply with the subpoena issued to them. Further ordered that Shell Oil Co. and Roger Rice be served with a copy of the show cause order, on or before the 1st day of April, 1981. cc: attys.

4/1/81	MOTION to Strike Defense w/suggestions in support of Motion of Applicant to strike defense fld. by Applicant EEOC.
4/1/81	MOTION for Protective Order that discovery not be had w/memorandum in support. fld. by applicant EEOC.
4/3/81	MOTION For Continuance w/memo fld. by pltff-respondent Shell Oil; REF. 6/30/81.
4/6/81	MEMO FOR CLERK—Shell Oil Co. is granted to 4/17/81 to respond to EEOC's Motion to Strike and Motion for a protective Order; SO ORDERED (CSC)
4/9/81	MEMORANDUM IN OPPOSITION to respondent-pltff's Motion for Continuance w/exhibit A. fld. by EEOC.
4/10/81	MOTION of Shell Oil Co. to enforce stipulation fld. by Shell Oil Co. w/memorandum in support & proposed order.
4/10/81	MOTION for reconsideration w/memorandum of law in support w/attachment #1 & Proposed order fld. by EEOC.
4/10/81	MOTION for Protective Order w/memorandum in support & proposed Order fld. by EEOC.
	4/13/81 Motions of 4/1/81 and 4/3/81 delivered to Judge Cahill.
4/14/81	HEARING RESETTING—By order of Court, sua sponte, the hearing on the order to show cause in cause is removed from setting on FRIDAY, April 17, 1981, and reset for FRIDAY, MAY 15, 1981, at 10:00 a.m. (CSC) fld. cc: attys.
4/14/81	CAUSE #80-1202C (5) Extension of time—pltff, Shell Oil Co., is hereby granted up to and including April 24, 1981, to respond to defts' Motion for Protective Order and Motion to Reconsider. Fld. (CSC) So Ordered.
4/17/81	CAUSE #80-1202C (5) OPPOSITION of Shell Oil Co. to Motion to strike defenses and Motion for Protective Order filed by Equal Employment Opportunity Commission in Civil Action No. 81-230C (5). fld.
	4/21/81 Motions of 4/10/81 and file delivered to Judge Cahill.
4/23/81	CAUSE #80-1202C (5) OPPOSITION to Motion to Enforce Stipulation fld. by EEOC.
4/24/81	CAUSE #80-1202C (5) OPPOSITION of Shell Oil Co. to Motion for Reconsideration. fld.

5/15/81	PARTIES PRESENT FOR HEARING ON ORDER TO SHOW CAUSE, PLFF'S EXHIBITS A THRU N ADMITTED INTO EVIDENCE, CAUSE ARGUED, HEARD AND TAKEN UNDER SUBMISSION
5/15/81	SUPPL MEMORANDUM—On Disclosure To Outside Consultants, fld by Plff., Shell Oil
6/24/81	TRANSCRIPT—Of Hearing, fld by Court Reporter for both causes (80-1202C(5)
6/30/81	ORDER & MEMORANDUM (CSC)—Fld., Ordered that the EEOC's Motion to Strike is DENIED. FURTHER ORDERED that the EEOC's Motion for Protective Order that discovery not be had is STAYED as to Shell's Interrogs #11-13, pending the filing of a certificate of privilege by the EEOC and DENIED as to Shell's Interrogs #1-10, 14-17, and Shell's First Request to Inspect and Copy Documents. FURTHER ORDERED that Shell's Motion for Continuance is DENIED AS MOOT. FURTHER ORDERED that the EEOC's Motion for Reconsideration is GRANTED. FURTHER ORDERED that Shell's Motion to Enforce the Stipulation is DENIED. FURTHER ORDERED that Defts' (EEOC, et al.) Motion for Protective Order is DENIED AS MOOT. cc: attys
7/20/81	MOTION—For Reconsideration and Clarification of the Order of Court of June 30, 1981, W/Memorandum in Support and Proposed Order, fld by the Plff., (ref____).
7/28/81	CROSS-MOTION—For Clarification, W/Memorandum in Support and Proposed Order, fld by Shell Oil Co., (ref_____)
7/29/81	NOTICE OF APPEAL fld by pltff-deft Shell Oil Co. cc: attys. Judge Cahill. Dist Ct. & USCA8 fees pd. Copy Notice of Appeal, Copy of Order & Memorandum filed 6/30/81 and 2 cert. copies docket sheets delivered to USCA8. 7/30/81. 80-1202C (5) consolidated with 81-230C (5).
8/10/81	REPLY to Cross Motion for Clarification fld. by EEOC.
8/24/81	CAUSE #80-1202C (5) SUPPLEMENTAL MEMORANDUM of Shell Oil Co. in Opposition to EEOC's Motion to Dismiss, First Motion for Reconsideration, Motion to Strike defenses, and Second Motion for Reconsideration and clarficiation w/attachments fld.

9/9/81	ORDER—USCA. fld. This case is remanded to the District Court for the Limited purpose of having that Court rule on appellant's pending Motion for Clarification of the District Court's memorandum and order of June 30, 1981, in No. 80-1202C(5). This court retains jurisdiction pending remand. cc: attys.
9/17/81	REPLY of EEOC to Supplemental memorandum of Shell Oil Co. in Opposition to EEOC's Motion to Dismiss, First Motion for Reconsideration, Motion to Strike defenses, and Second Motion for Reconsideration and Clarafication. [*Sic*] fld.
9/22/81	JUDGMENT (CSC) fld. Ordered, adjudged, and Decreed that judgment is entered for the EEOC in civil action No. 80-1202C (5), Shell's action to quash the subpoena. Ordered, Adjudged, and Decreed that judgment is entered for the EEOC in civil action No. 81-230C (5), EEOC's action to enforce the subpoena. cc: attys.
9/22/81	ORDER AND MEMORANDUM (CSC) fld. Ordered that civil action No. 80-1202C (5), Shell's action to quash the subpoena, is DISMISSED. Further ORDERED that Shell shall comply with the subpoena issued it in connection with the investigation of the charge by allowing EEOC reps access to the subpoenaed documents and info commencing no later than October 23, 1981, and continuing until production is completed. Ordered that EEOC may not turn over any of the info obtained via the subpoena to outside consultants. Further Ordered that EEOC;s mtns for protective order that discovery not be had and to strike defenses are DENIED. cc: attys.
10/9/81	NOTICE OF APPEAL fld. by deft-appellant. cc: attys, Judge Cahill. Dist. Ct. & USCA8 fees not required—USCA retains jurisdiction. Cert. Copy Notice of Appeal, copy of Judgment entered 9/22/81 and Order of 9/22/81, and 2 cert. copies docket sheets delivered to USCA8, 10/13/81.
10/9/81	MOTION for stay of enforcement Order pending Appeal and for approval of supersedeas Bond, w/Memorandum of Shell Oil Co. in support & Proposed Order. fld. by Shell Oil Co. (ref. 11/9/81).
10/9/81	APPEAL BOND—LODGED. by Shell Oil Co.
10/13/81	PUBLISHED with West Publishing Co., Bureau of National Affairs and Lexis Opinion Collection Dept.—Order & Memorandum filed 6/30/81 and Judgment, Order and Memorandum filed 9/22/81.

**

10/19/81	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION to Motion for stay of enforcement pending appeal fld. by EEOC.
	**10/14/81 Motions of 10/9/81 and 10/13/81 and file delivered to Judge Cahill.
10/26/81	DESIGNATION OF CLERK'S RECORD AND STATEMENT OF ISSUES ON APPEAL. fld. by Shell Oil Co. (appellant).
10/30/81	REPLY MEMORANDUM of Shell Oil Co. in support of Motion for stay of enforcement Order pending appeal w/attachments fld.
11/9/81	ORDER AND MEMORANDUM (CSC) fld. ORDERED that Shell's motion for stay of the enforcement order of September 22, 1981, pending appeal and for approval of a supersedeas bond in the sum of $250.00 is GRANTED. cc: attys.
11/9/81	COUNTER DESIGNATION OF CLERK's RECORD ON APPEAL fld. by EEOC. (appellee)
11/16/81	DELIVERED TO USCA8.—One certified & 2 copies of designated record, 1 vol. transcript of hearing of 5/15/81.
11/24/81	MOTION for permission to file notice of Appeal out of time fld. by EEOC. Notice of Appeal Lodged. Leave to file Notice of Appeal Granted (CSC) 12/3/81.
12/3/81	Motion of 11/24/81 and file delivered to Judge Cahill.
12/3/81	NOTICE OF APPEAL fld. by pltff EEOC. cc: attys. District Court & USCA fees not required.
12/9/81	Delivered to USCA8—Cert. copy Notice of Apeal, copy of Order and Memorandum fld. 9/22/81 and 2 cert. copies of docket sheets.

TRANSCRIPT OF HEARING
May 15, 1981

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action
No. 80-1202-C(5)

SHELL OIL COMPANY, PLAINTIFF,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., *defendants.*

Civil Action
No. 81-230-C(5)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

SHELL OIL COMPANY, ET AL., DEFENDANTS.

St. Louis, Missouri
May 15, 1981

[1] TRANSCRIPT OF HEARING

Transcript of testimony adduced and proceedings had during the hearing of the above-styled cause before the

HONORABLE CLYDE S. CAHILL, JR.,

Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 5 thereof.

APPEARANCES

MSES. DONNA L. HARPER and DIANNA B. JOHNSTON, attorneys for plaintiff EEOC.

[2] MESSR. MARTIN D. SCHNEIDERMAN, MS. SUSAN J. SANDLER, MESSR. CHARLES A. NEWMAN and MESSR. SAMUEL T. PERKINS, attorneys for defendant Shell Oil Company, et al.

* * *

THE COURT: Now we'll hear the matters involved, EEOC versus Shell Oil, one of the number of matters.

MR. NEWMAN: Your Honor, if I may I'd like to reintroduce myself to the Court. I'm Charles Newman representing the Shell Oil Company and I'd like to introduce to the Court as well, counsel appearing on behalf of Shell in addition to myself are Mr. Martin Schneiderman, Mr. Samuel Perkins and Mr. Schneiderman and Mr. Perkins are both members of the District of Columbia Bar and they're with the firm Steptoe & Johnson. Additional counsel for Shell Oil Company is Susan Sandler who is with the company and is a member of the bar of the state of Pennsylvania. I'm pleased to introduce these members of the bar to the Court and with the Court's permission ask that they be permitted to participate in these proceedings.

MR. SCHNEIDERMAN: We've participated quite a bit already, Your Honor. First of all I'd thank Your Honor for the indulgence of the continuance for Friday the 13, we appreciate that adjustment and it's a pleasure to be in St. Louis, it's pretty as the postcard, Your Honor.

Your Honor, we're here on the immediate basis to [3] deal with a request to show cause that I want to point out that initially we've had a morass of pleadings filed in this case.

THE COURT: You used that term, Counsel, I'm glad you did that.

MR. SCHNEIDERMAN: And there are a number of open issues and open questions and I might say that while I intend to focus initially on the show cause I would very much like to conclude with an overview statement of how we think all that morass may be resolved very efficiently and very expeditiously and believe it or not, I think it can be done.

Now first focusing on the subpoena and order to show cause we believe it should not be enforced, Your Honor, basically because the underlying charge is invalid, unlawful and so is the subpoena. I'm going to develop the reason why we've taken that position but preliminarily I have to emphasize that the complex issues raised in that case re-

quire some limited discovery be concluded before the show cause determination can be made. We have raised substantial arguments regarding both the charge and the subpoena. We've filed a complaint, a motion to dismiss was filed and that motion was denied. The Court issued an order indicating that these issues can best be resolved after development and presentation of the facts. That to me represents a notion of some limited discovery and we think that that [4] discovery should take place now Your Honor so that in resolving the show cause the substantial challenges that we've raised could have a meaningful hearing because without that discovery which I will develop further— without that discovery that meaningful hearing on the Shell cause cannot be provided.

Now let me first perhaps overview the arguments that I'm going to cover relating to the show cause and it really has an impact on discovery and all the other issues.

We believe the charge—the underlying charge is invalid for two reasons. First of all, Your Honor, it represents a misuse of commissioner's charging authority. In this case it is being used as we understand it upon our belief as a general audit investigatory power of EEOC, a power that it does not possess. Secondly, the underlying charge is invalid because it fails to provide notice with any sort of specificity of the particular claim—the particular allegations of discrimination contrary to statute and regulations. Those are the areas relating to the charge.

As to the subpoena, Your Honor, we believe the subpoena is in itself unenforceable because it has not been provided with—we've not been provided an assurance that the government will not release the information to a third part consultant who is not a—who is not an employee of the government. The subpoena is also invalid because it [5] represents a violation of the Federal Reports Act and finally, Your Honor, individually portions of the subpoena are invalid because they represent requirements to make compilation irrelevant or burdensome.

Now we'll go back and cover each of these issues. The key ones deal with the underlying charge, the key in the sense that they raise a rather unique issue. I would say

that the factual setting of this case indicates that we have before us an issue unusual indeed, perhaps unique. This factual setting makes a very compelling position for Shell's Wood River Facility. It demonstrates that EEOC has misused the commissioner's charge authority. When Title 7 was enacted the agency was established to respond to complaints—it was a complaint oriented agency to investigate and attempt to conciliate charges. Now there was a commisioner's charge authority. EEOC's briefs in the legislative history indicate what that authority was about. That authority responded to a concern that employees may not come forward because of concern about retaliation so they didn't want to sign their names. Legislative history indicates that the commissioner's charged authority would permit EEOC to act. They would have reasonable cause because someone would come forward, an individual would come forward and express their concerns about retaliation and then the commissioner himself or herself could issue a charge. That is what commissioner's [6] charge was basically intended to do and I think that's even in the EEOC's briefs. Whatever additional purposes the charge may—commissioner's charge authority might involve one thing it does not involve, Your Honor. EEOC is not an agency that has authority to decide to audit target industries, target companies that they feel are worthy of interest. They need something more than just interest. Now this misuse of the commissioner's charge authority is apparent and magnified in this case, Your Honor, because unfortunately EEOC has selected for this audit a company with a facility—the Wood River Facility with an extremely commendable performance.

Let us look at the factual setting of this. It employs now about seventeen hundred employees six years prior to the charge so it's a large facility and six years prior to the charge it has never—had never had any charge filed against it by any employee or applicant. In a decade, Your Honor, it has had two charges filed with state agencies and both dismissed without cause and over the decade, Your Honor, they've had over two thousand employees, the size of the organization has grown smaller. In my experience,

Your Honor, of about ten years in Title 7 practice I can't say that it is a unique record but I could say with confidence it is unusual indeed for a facility to have that sort of record of not having individuals coming forward [7] and filing charges and not suprisingly, Your Honor, my review of the composition work of the facility indicates that they're well above available labor market in terms of the percentages of blacks and females employed there. I would say that in essence I see nowhere in the record—nowhere in my review a scintilla of practices suggesting the basis or justification for issuance of a commissioner's charge of sex or race discrimination. If there had been an array of individual charges pending we could see that EEOC has some basis of concern. It has none to the company's knowledge. It is awaiting a statement of commendation for its performances and instead what does it receive? It receives a commissioner's charge alleging the complete array—possible broadest array of sex and race discrimination without any statement as to why.

Now that's the setting from the company's vantage point. Let's look at EEOC's vantage point. What has happened in recent years? You recall that the charge was filed here in the end of 1979. In the beginning of 1979 EEOC established the Office of Systemic Programs. It had existence as a subsidiary organization but in the beginning of 1979 it established this organization as an independent major operation of EEOC. It had support staff in Washington, computers, demographers, whatnot and in all the districts, Your Honor, they set up EEOC's personnel assigned to the [8] Office of Systemic Program. This is now current, this is a 1979 program. Now they have this system now of looking into systemic programs and what do they need to keep all their personnel busy? They need across the board charges of discrimination by commissioner's charges so what do they do? They set up a system of having—I don't want to use a quota system but what they did was sent out instructions—this is all on information and belief, Your Honor, I want to get this in discovery, okay?

THE COURT: I was going to suggest that that probably ought to be added in your comments.

MR. SCHNEIDERMAN: Yes, Your Honor, okay, so let the record indicate on my statement this is what we're trying to demonstrate in discovery.

We understand, Your Honor, that they would send out a system of asking the various districts to come up with your targets for commissioner's charges. What does this tell us? It tells us initially that the Wood River is selected. One basis for its selection is geography. It happens to be in a district that needs additional commissioner's charges or across the board allegations. Does this tell us about the employment practices of Wood River? No, it does not. What is another standard that I believe applies? They're not going to use all these resources, the computers, the demographers for a small company, they want [9] to use it for large companies so Standard Number 2, the Wood River Facility, is a large facility. What is yet another standard that we believe has been applied? This one is rather clear. In EEOC's—some manual statements as to selection technique, they indicate that they look for companies that they believe are in growth industries, they want a target company that afford opportunities for employment. They see that this is a more interesting area of investigation. When this charge was filed undoubtedly the refinery business in Wood River was viewed as a growth industry.

Now, Your Honor, this might be a worthwhile standard for an organization that has authority to go in and investigate companies that are worthy of investigation, but for an organization that is mandated to investigate based on reasonable cause or cause to believe that discrimination has occurred, it seems to me you cannot and should not rely upon factors external to the company and I believe that is what has occurred here and that is exactly one of the major areas of our discovery to demonstrate that the selection technique is more of an audit technique and not directly related to the internal practices of the company.

If those external factors have played a significant role in the decision to issue this charge, Your Honor, we believe that that would be an apparent misuse of the [10] commissioner's charge authority and Your Honor, this is a very recent activity, these occurred in 1979. I think the record

would show that there was an increase of commissioner's charge based on the whole systemic program.

THE COURT: Well, Counsel—

MR. SCHNEIDERMAN: Yes?

THE COURT:—Is it your position that an investigative agency could not use the requirements that you've indicated, that they could not consider the fact this was a large company, that it did have growth potential and it was located in an area in which perhaps there were not as many large companies or not as many complaints as there might have been in other districts? Is that improper?

MR. SCHNEIDERMAN: Your Honor, there is an organization called Office of Federal Contract Compliance—

THE COURT: Yes?

MR. SCHNEIDERMAN: —That agency uses just these types of considerations. It is an agency that has general audit responsibilities. For that agency I think these are reasonable standards. For EEOC, an organization that is to respond to complaints and to respond to charges filed, it is a misuse of that authority to say that we're now going on our own to consider areas or targets that are of interest because it does interest us because of these extraneous factors. The legislative—Your Honor, as we pointed [11] out in one of our briefs which had the *Clark* case memorandum, that drew a clear distinction between EEOC and the FTC. The FTC could go in on suspicion like a grand jury just for interest. Even the other briefs—EEOC's brief points to the agency most analogous to EEOC and that would be the NLRB. That agency, Your Honor, responds to charges. It does not go out and find target techniques, it does not say that we ought to look into what this company is doing, it needs a charge and a charge has to be based on something and that's what we are saying, Your Honor, is what the misuse is here.

THE COURT: All right.

MR. SCHNEIDERMAN: Okay. Now that is the first half—oh, by the way, Your Honor, on this OFCCP matter that I referred to, we have here—there was a recent report of the General Accounting Company and we'll have copies of the relevant portions and we have the entire report, but

the GAO, the General Accounting Office made an overview of EEOC's functions and it found a determination that the systemic programs funding essentially overlaps on OFCCP's and then it recommended the consolidation of the functions. What is interesting that a government agency looks at this and sees they are now functioning similarly. It should not and has not been intended for EEOC to function in the matter of that OFCCP has and this is a unique issue I think a first impression clearly in the circuit and to my mind in any [12] circuit.

Now we go to second point regarding the charge. This is more technical. It deals with the element of sufficient notice in specificity in the charge. Your Honor, the statute itself says that the charge ought to contain the date, place and circumstances of the alleged discrimination practices. The charge here provides us with the place, nothing else as far as we're concerned. The date and circumstances are insufficient to provide us with sufficient notice, there is not one specified practice. I would follow that up is—as stringent as the statute appears, EEOC has implemented the statute with its own regulation and its own regulation states that a charge should contain a "clear and concise statement of the facts including pertinent dates constituting the alleged unlawful practices." We have not seen a clear and concise statement of the facts. This is EEOC's own regulations.

Now, Your Honor, if this was an individual, an employee, a layperson unsophisticated in requirements of filling out charges we could see application of another provision that permits some liberality but this is the chairperson filling out a commissioner's charge with the commissioner's own regulations calling for a clear and concise statement of the facts. We deserve it, we need it and this is not quite as technical a procedure as it might appear [13] because the purpose of these requirements in the statute and in the regulations are twofold; number one, they permit the company the option to consider what the practice is and perhaps cease and desist if it is in fact discriminatory and eliminate the incurring of liabilities. This is a very important aspect of notice. We don't have it here. The state charges here re-

ally do not provide a statement of any practices. Secondly, it relates to retaining of evidence. I really could not advise what evidence is to be obtained, I guess nothing, perhaps it's just unwieldy and unworkable to know exactly what ought to be retained and I think really it loses that effect. You do not know what to retain so I think the very objectives of the notice are not met so we're not talking about just a procedural requirement, we're talking about a procedural requirement with substantive overtones. I guess we could put these two arguments together and simply say that we believe that EEOC in issuing a commissioner's charge must possess—it must have, it must articulate some reasonable basis for issuing commissioner's charge. We're not saying they have to prove their case, we're not saying they must have a prima facie case, we're not saying they have to disclose all their facts, we are saying that they must possess and articulate some basic underlying circumstances and practices of that charge period.

That gets us, Your Honor—I would like to make [14] one passing reference about the charge to the *Dean Witter* decision. The *Dean Witter* decision is analogous in the sense that in that case a question was enforcement of a subpoena following a commissioner's charge and a Court in that case found that the date was not specified as required and found that the charge was deficit and it should not be enforced. I would say that the EEOC views that case as an aberration. I view that case as a small step in the right direction.

Now we go on to some matters about the subpoena. The first issue deals with the asserted release, the authority to release the information that they would obtain via the subpoena to outside third party consultants. The statute 706C refers to a prohibition of employees from disclosing this information to the public. EEOC argues that a third party consultant is an employee. Obviously, third party consultant is not an employee. The provision is rather explicit that employees may not disclose to the public, a third party consultant is not an employee and therefore must be viewed as a part of the public, Your Honor.

We have today a very interesting case that just came down in the Tenth Circuit in an analogous area. That dealt

with requirements of access and to—under EPA and in those cases, Your Honor, their provision was the EPA—the EPA administrator or his authorized designee and was far broader than the employee provision in our case, in 709E and [15] even in that setting, Your Honor, of the Tenth Circuit they ruled that an authorized representative meant the government employee or government representative and not an outside consultant. This just came down and we have a very short brief to submit. I would add that brief points out that there is a contradictory position of district courts but bear in mind the statute they dealt with authorized representatives, the statute here deals with employee—prohibitions on employees.

Now the Federal Reports Act argument is an argument that is part and parcel of the general audit authority that we have criticized in the commissioner's charging authority. The Federal Reports Act would apply to general investigatory functions of targeted industries. The Federal Reports Act—the prior act and the modified amended act applies to OFCCP for example. This is the position of OMB, the federal agency that enforces the Federal Reports act and the new act. They have taken a position that if OFCCP wishes to do its general auditing of selected companies it must clear its request with OMB. If as I have suggested EEOC is using the commissioner's charging authority much like OFCCP then it is found in the same fashion as OFCCP to have its request cleared by OMB.

Your Honor, since we have I think these major overview issues about the charges and the subpoena I—we'd anticipated resolving those issues. There are some [16] particularized questions regarding the subpoena itself dealing with relevancy and burdensomeness, however, I would put those issues aside, Your Honor, and see what EEOC has to say and get the Court's indulgence on these other issues to consider them at a later date or whenever it's convenient.

THE COURT: It might be a bit more coherent to handle the overall questions first before we get into the specific allegations as to the deficiency.

MR. SCHNEIDERMAN: Okay. Finally, Your Honor, I would just say I had promised to bring order to the morass

and with that we have today also a proposed order which contemplates the following: we believe that very limited discovery regarding basically the techniques that we've talked about, the misuse of the commissioner's charging authority and in—in some relating the Federal Reports Act, a small number of interrogatories and perhaps one deposition and we would be ready to go with a definitive motion of a summary judgment and we believe we could set out a schedule that all issues in this case can be resolved in a very expeditious fashion if we get any sort of cooperation from EEOC.

THE COURT: Well, I'm certain they'll cooperate if the Court orders it to be done and I'll give them a chance to respond to the arguments that you've made that the commissioner's charge is inappropriate under these circumstances.

[17] MR. SCHNEIDERMAN: Thank you, Your Honor, very much.

MS. HARPER: I'd like to reintroduce myself to the Court. I'm Donna Harper—

THE COURT: I do recall.

MS. HARPER: —Representing the Commission. The gentleman here to my right is James Neely, he's the regional attorney from St. Louis and Dianna Johnson is our counsel from Washington who's defending the agency on the suit by Shell. Miss Johnston is a member of the District of Columbia Bar.

THE COURT: For clarification—now I'm presuming that there are other suits against—there are other suits brought by EEOC involving Shell Oil Company and involving the same pertinent issues. This is not the only one, is that correct, or do you know of others?

MS. HARPER: Other suits brought by EEOC against Shell Oil?

THE COURT: Yes.

MS. HARPER: I'm not familiar with any. I presume that there were others—

MR. SCHNEIDERMAN: This is the only case of EEOC.

THE COURT: This is the only one?

MR. SCHNEIDERMAN: Yes.

THE COURT: All right. Makes it easy for us or hard.

[18] MS. HARPER: Your Honor, we're at—in a somewhat difficult position this morning here because we're here to enforce our subpoena and as we've pointed out in our brief we have taken the position all along that the subpoena enforcement under the prevailing law in this and every other circuit requires simply that the agency prove that it has the authority to issue a subpoena, that the subpoena requests information that is to the matters under investigation or to the matters contained in the charge and that this subpoena isn't unduly vague, that it gives the company or the respondent notice of what it is to call upon to provide.

We don't believe that subpoena enforcement proceeding is proper forum to determine whether or not a commisioner who swore to a charge in fact had probable cause or whether there's merit to the commission having issued the charge. The defendant here is urging that we basically—despite it's contention to the contrary—that we basically have to have a prima facie case or that we basically have to enunciate facts in circumstances in the charge that are much greater than the commission and any of the circuit courts have ever required us to do. We don't believe also that the subpoena enforcement proceeding is a proper forum to challenge the agency's published procedural regulations or to challenge any of the standards which are published in the Code Federal Regulations pursuant to which commissioner's [19] charges are issued and by which the systemic program operates.

In any event, what we'd like to do I suppose first is I'd like to have counsel from headquarters, Miss Johnson, respond to the—to Shell's arguments with respect to the Federal Reports Act and arguments they made this morning on—Federal Reports Act and one other argument they made and then if we can get into the subpoena enforcement and if Shell is willing to come forward and show cause why the subpoena should not be enforced on the grounds that we believe are appropriate here, that is, why the subpoena is not relevant and why the authority does not or why the agency does not have authority to issue it and we're prepared to answer any of those arguments.

THE COURT: Let's hear from counsel from Washington.

MS. JOHNSTON: Good morning, Your Honor. We would probalby agree with Shell that perhaps one of the most important issues here is the issue of the sufficiency of the commissioner's charge. Where we disagree is in Shell's assertions that this is unique. This issue has been litigated over and over and over ad nauseum. Employers have repeatedly challenged the sufficiency of commissioner's charges. In every case, courts have upheld commissioner's charges that are indistinguishable from the one at issue here. Shell has chosen to call this an audit but it is not an audit and the issue in this case more importantly is not [20] what led to the issuance of the commissioner's charge, the fact is that commissioners have authority to issue a charge under oath stating that they have reason to believe that a particular employer has discriminated, that is what has happened here. Quite recently the District Court in the Middle District of North Carolina in the case of *Foodtowne Stores* v. *EEOC* observed that the EEOC is authorized to investigate a business suspected of engaging in unlawful employment practices. It is only necessary that EEOC put the employer on notice of the violation charged, a charge such as this here that the employer failed to recruit, select and train blacks and women and it is sufficient to meet the notice requirements. The employer does indeed know what it is that they—it is being alleged is happening. They say that they don't know what records to keep. Well, clearly if there is an allegation that they have failed to promote blacks or women, that they have failed to hire blacks or women, one of the things that they're going to have to keep is records of the applicant pool, that's not too hard to figure out. Court after court has held that if more notice than that were required it would mean that the commission in its investigation cannot ask questions to which it doesn't already know the answers. In this regard, I would like to point out that it's interesting to me that Shell has not raised any cases to support its argument and the reason it hasn't, Your Honor—[21] I can't urge you strongly enough to read the cases cited in our brief and in there there's that this is—has just been litigated countless times and always the

courts have come out with the position that EEOC is here arguing today.

Plaintiff's assertions in its opposition to our motion for reconsideration that it's not contesting the factual determination but is attacking the charge based— because it is based on no factual determination is absurd on its face, Judge, it's a circular argument. The point here is that the employer cannot inquire into the factual basis of the charge, as the court's in both Graniteville and Foodtowne have observed there's no provision in Title 7 which authorizes an inquiry into the sufficiency of the evidence supporting a charge and here we get to their issue of we have to have limited discovery. They don't have to have limited discovery. What is important is that a charge has been issued under oath, they are on notice of what their allegedly unlawful practices are and so inquiring into how we came up with that or what led the commissioner to believe it is irrelevant. It's also interesting that they keep saying "Well, we're not really trying to get into the basis of the charge" and so forth, yet repeatedly in their briefs and again before you this morning they started talking about their wonderful record as an employer. That's not relevant at this stage. All EEOC has done is initiated an investigation [22] to see whether or not in fact their assertions about their good record as an employer are true. They do—they did that again at paragraph thirteen of their complaint and in some of their interrogatories they're obviously trying to get to the merits of the charge and it is too early to get to the merits of whether or not they have discriminated.

The Fifth Circuit in a similar challenge to a commissioner's charge noted that charges just like this one are sufficient to begin the commissioner's investigatory processes. The court then said to hold otherwise would totally obscurate the powers of the EEOC to function under its charter from Congress. I can't stress enough, Your Honor, the importance of dismissing Shell on this issue. Employers must not now be permitted to make the kind of inquiry into the sufficiency of the charge that is attempted here and which no court has allowed. The harm that would be involved— that would work on the EEOC's functions are in-

calculable but a couple of them were noted by the court in the *Dean Witter* case. The first is that if the EEOC has to supply all the information which provided the basis for the charge, employers would undoubtedly then begin to challenge commissioner's charges on the basis that the EEOC should have or could have supplied more information. Another one—one, not all—but one of the reasons commissioner's charges were allowed was to protect people, aggrieved persons who were afraid [23] that they might be retaliated against if they came forward with a charge. If the employer can inquire into what was the basis for the charge it would completely do away with that reason for the commissioner's charges because they know the employer would have to be told the very thing that that provision was enacted for.

There is in the—under the general heading of sufficiency of the charge a related issue of the degree of specificity which is required be the dates of the discriminatory practices and until very recently every case that had considered the issue again had upheld commissioner's charges which stated that the violations were continuing, the concepts of contining violations in employment discrimination is well recognized. Now there is one case and that is the *Dean Witter* case in the Ninth Circuit which has said that the charge must specify the date the discrimination began. Realistically, Your Honor, that's a little difficult in systemic programs, almost by definition you don't know exactly when it began, probably it's reasonable to assume that it began quite some time ago even before the enactment of Title 7 but the nature of it is such that it's difficult to tell. More importantly is the court's reasoning in the *Dean Witter* case for saying specify the date and this commissioner's charge by the way did specify that it believed it was a continuing violation but at any rate, the court's [24] reasoning was that it would be important to discourage resistance to discovery by employers who might be fearful of the open-ended investigations. Well, that reasoning isn't applicable in this case, Your Honor, because in fact what has happened is in our request for information and our subpoena, the information has been asked for no further back

than 1976 so that's not the kind of open-ended discovery that the court seems to be concerned about in the *Dean Witter* case.

In any event, the charge has now been amended as you know and that amendment is sufficient under the terms set forth in *Dean Witter*. *Dean Witter* itself recognizes the temporal scope of challenge practices would be uncertain and said that a good faith estimate of the probable time periods would suffice and that's what we've done now with the amendment of the charge. Shell says that the amendment doesn't cure the prior alleged defect but the courts have repeatedly permitted the amendments of charges to cure technical defects and the amendment also relates back to initial charges. One such case involved a commissioner's charge and it's *Motorola Incorporated* v. *EEOC*, that's 317 Federal Supp. 282, so even assuming for the sake of argument that the original charge was defective, any such defect has been cured by the amendment.

The second major issue raised by Shell involves [25] the commission's use of consultants such as a statistician and computer experts to analyze the data submitted by the employer. Shell alleges that such—to turn over any material that they give to us to that person would violate the confidentiality provisions of 709 of Title 7. The commission's position which has been elaborated in our brief is that Section 705 Title 7 permits the commission to utilize agencies and individuals in and carrying out the commission's mandate and that as Senator Humphery explained when he introduced the non-disclosure provision and those provisions of 709 are abandoned publications, they are not meant to hamper investigations.

The courts should note that the non-disclosure provisions of 709 faded away once litigation has been commenced so the result of allowing or forbidding any outside consultants to see the—the data that the employer has turned over would be to perhaps—perhaps to initiate a premature case because those people, statisticians, would help to analyze the data and determine whether it gave good basis for a finding of cause or not and if not, there would be no suit ever and if so, then the record could be better prepared for

the court so their argument has that strange effect of reversing the Congressional intent which is to—as in Title 7, to do as much as you possibly can in the administrative area.

[26] I also would like to direct the Court's attention to the fact that Shell based a lot of its argument that 706 and 709 prohibits consultants from seeing the data. On the Circuit Court opinions in *Sears Associated Dry Goods* and *Burlington Northern* and those cases have all been reversed by the Supreme Court's recent decision in *Associated Dry Goods* and more ever, with regard to this subpoena enforcement action the commission's position is that Shell's arguments here are not well-founded, that the court could, if it felt otherwise, still enforce the subpoena with the stipulation that the information not be turned over to the consultants so that should not be a bar to the enforcement.

THE COURT: That's commonly done and frequently done in both labor litigation and securities and other commercial negotiable instruments, frequently that is done.

MS. JOHNSTON: Now turning to the issue of the Federal Reports Act, it's really a fairly simple issue, and whether this is the kind of information that was intended to be covered by the Federal Reports Act. The commission has already argued in its brief that it is not. Based on the fact that the definition of information in Section 3502 of the original Federal Reports Act doesn't include the kind of data gathered during a particular investigation but effective May 1st of this year the Federal Reports Act was replaced by Paper Work Reduction Act of 1980. The new act [27] strengthened and clarified the Federal Reports Act and the new act very specifically at Section 3518 says that the act isn't applicable to material gathered from—for administrative investigations. Shell's allegation that this investigation is—it is an audit is spurious. A commisioner has stated under oath that there is reason to believe that Shell discriminated against blacks and women at its Wood River Facility. It's true that the commission doesn't deny that similar questions may have been asked over the course of time to ten or more people. EEOC's job after all is a rather

narrow one I suppose, investigating charges of employment discrimination. Obviously similar questions arise. Again, if there's reason to believe that an employer has discriminated in hiring, questions regarding an applicant pool are relevant. That doesn't—the fact that may have come up several times does not make this particular investigation an audit. Any auditing types of activities that may be done by EEOC is done through their employer information reports, more commonly known as EEOC-1's, EEOC-2's, et cetera. Even if Shell's argument that the old Federal Reports Act did apply to requests made during an investigation when ten or more people happen to have answered the same question would prevail, there wouldn't be any remedy now because of the new act. The commission can only start over again and reissue its new questions which very clearly and they have [28] virtually conceded in their brief does not apply to administrative investigations. The only result then would be to add more delay to the case.

Shell's Federal Reports act argument is wholly without merit and we believe should be dismissed for failure to state a claim.

One last issue from the standpoint of the commission is whether the employer—whether an employer can challenge an administrative subpoena in court prior to the time the EEOC seeks judicial enforcement. The commission contends that it cannot and that Shell's suits against the commission in Civil Action 81-202-C should therefore be dismissed. It's important to remember that there is no harm done to an employer by issuance of a subpoena although we would certainly hope that most employers would see fit to cooperate. The fact is that they can refuse to comply with a commission's subpoena with impunity and only the court can order compliance. In order for a case to be ripe for judicial review the plaintiff must show that it has suffered or is threatened with some real and immediate harm. That is not the case prior to the time the EEOC seeks judicial enforcement. In practical terms this case is indistinguishable from the Supreme Court's recent case in *FTC* v. *Standard Oil* and in that case issuance of the charge and the administrative subpoena has no legal or practical effect on Shell [29]

Oil. It's true that the enforcement action was subsequently brought by EEOC but that doesn't change the fact that it had not been brought when the suit was filed.

Your Honor, it seems to the commissin to be very important to dismiss Shell's suit that was filed against us and to put employers on notice that the Federal Courts were not—will not permit employers to use the device of premature litigation to interfere with the proper functioning of the agency and burden the courts. As the Supreme Court noted in the *Sogo* (phonetically) case, "premature intervention denies the agency the opportunity to correct its own mistakes and leads to piecemeal review which at the very least is inefficient and which may prove to have been unnecessary." Shell has argued that their case is dinstinguishable from *Sogo* because this suit involves a challenge to a subpoena while *Sogo* was they say merely seeking a declaratory order the issuance of the complaint was unlawful. In fact, Sogo was faced with a lot more than just having to turn over some records to the FTC. Sogo was faced with an adjudicatory proceeding where they would have to present evidence and testimony. Therefore, the court's reasoning in *Sogo* is certainly applicable here. Also, Shell attempts to distinguish that case because this is the EEOC and not the FTC but again, I would direct the court's attention to the numerous cases that we've cited involving this whole [30] commissioner's charge issue and in most of those cases the court has—courts have referred to cases like *United States* v. *Morton Salt* then involve the FTC, have referred to those cases favorably and have said that the procedures of FTC and EEOC are at least analogous and in fact, many of those cases upholding commissioner's charges involving these issues came during the time when the '64 version of Title 7 was extant and since that time in '72 the commission investigatory powers have been broadened so their—that distinction is one without a difference.

Shell cites numerous cases for the proposition that a challenge to the sufficiency of a charge is ripe in an action to quash a subpoena. However, as the commission has demonstrated in its reply briefs, particularly a note 14, these

cases all arise in the context of enforcement actions or counterclaims. The one exception to that is one of the original *Associated Dry Good* cases and that is just—was very different in that the challenge there was to EEOC regulations so the ripeness issue was very different than in this case. The point is that employers ought not to be permitted to go to court to quash an administrative subpoena for which enforcement hasn't been sought. It's certainly possible that an agency would decide not to enforce a subpoena and again there would be the kind of waste of judicial resources that the Supreme Court expressed concern about in [31] that case and to dismiss the suit by Shell against the commission hardly leaves them defenseless. They admit repeatedly that the suit was for the purpose of halting the EEOC subpoena. If they have grounds for arguing that the subpoena shouldn't be enforced it could be done in that context.

I'd like to point out to the Court, too, that it certainly can rule narrowly if there is one issue that troubles the Court and the Court does not deem appropriate for a motion to dismiss it can still and should dismiss all those other issues on which Shell has failed to state a claim.

THE COURT: Thank you, your comments were interesting and do you want to reply?

MR. SCHNEIDERMAN: Yes, Your Honor.

THE COURT: All right.

(Recess.)

THE COURT: We're ready to resume and I'll hear you now.

MR. SCHNEIDERMAN: Yes, sir. Your Honor, just a few responses to a number of the areas. Many of them are covered in the brief and I'll try not to repeat what is covered in the brief.

First of all, Your Honor, on the pre-enforcement action, the motion to dismiss because it was a pre-enforcement action, obviously, Your Honor, I had thrown out my [32] section of oral argument on that issue because we got an enforcement action. The fact is that question is moot with the filing of an enforcement action that's been consolidated so I don't see how that lingers on as any possible issue. It is

clear that when you have an enforcement action whatever the elements of the arguments before it's no longer a question before the court.

Now I think on the key issue I must say I'm—remain confused and confounded by EEOC's position. On one hand, I sense that they admit they do not have general audit authority. This seems to be a tone accepted in the brief and an argument today. If they do admit that then we have a clear legal issue to address. On the other hand, in the interest of justice that they have this audit authority—this is confusing. On the other hand, I seem to see elements that they say that they do not have audit authority but what they say is the commissioner signs the oath and that is the end of the inquiry. You need reasonable cause, you need cause but even if you need cause there is no way to find out, there is no accountability for that particular requirement. Your Honor, I can't believe that this is the law and I don't believe that the various cases cited by EEOC even comes close to addressing that issue. It is not until 1979 that we have this Systemic Programs Office functioning in the way it has been. All the cases cited, early cases in the [33] early '70s and even those cases are very interesting, Your Honor. I don't think they detract from our position one iota. The *Dean Witter*, of course, is a case that the subpoena was not enforced because of a defective underlying charge. The *Chrysler* case cited is an individual charge in which there was an attempt to question—that—the aspects, the reasonable cause of an individual file on the charge. The Fifth Circuit decision cited by EEOC, they didn't specify it, but I assume from the brief that it's *NOPSI, New Orleans Public Service* v. *Brown*, it's a very intriguing case, Your Honor, because in that case the EEOC and the commisioner charged an array of statistical data and allegations far broader than was involved in this case and the District court on a point that was not reversed on appeal—the District Court found even that charge insufficient but he also noted that the 1972 amendments calling for oath requirements heightened and increased the obligations of EEOC in filing commissioner's charges and this is in conformity with other decisions. On appeal the court

found that the extended allegations in the *NOPSI* case were satisfactory. This is a far cry from the type of allegations involved in our case where we have a broad statement—example of a case cited, *General Employment Enterprises* v. *EEOC* and there was a single claim that the company does not employ Jews or blacks. That is a—that was the charge, it's a straight employment [34] practice, Your Honor. When you say you don't employ, you don't promote and you don't train, you don't assign, in one broad statement I think there is a very real distinction in terms of notice as to what the practice are involved. *Graniteville* was an individual charge, *Bowaters*—the *Bowaters* charge charged it was specific practices referred to in the commissioner's charge. The charge had a reference to testing—unlawful testing and unlawful use of particular categories of positions. It is simply not true that we have a vast array of indistinguishable charges, Your Honor.

In addition, I might add that none of the cases of the Eighth Circuit cases is clearly a novel issue even in EEOC's terms in this particular circuit so none of these cases addresses what I view as the issue of the Systemic Program approach of an audit technique.

Now as to the question of the amended charge and response to the *Dean Witter*, I believe Your Honor that it is not responsive to the question raised in *Dean Witter* and I might add in the *Dean Witter* case I know of no effective amendment that would bring back to life the charge that was viewed as defective in that case and I don't think an adding of the beginning date of the Title 7, Your Honor, is realistically a response to the objections raised by the court in the *Dean Witter* case.

I'd like to refer to the *Mohasco* decision which [35] is a Supreme Court decision which is not directly on point, Your Honor, it deals with technical filing requirements but I think it shows the thrust of the Supreme Court's attention to technical requirements. I raise this particularly in light of specifics, the negotiation issue that has been raised. In *Mohasco* the Supreme Court indicated that though you have technical requirements in the procedural it is very important to assure, even hinder justice, that we impose and

apply those technical requirements and they are written by Congress. There is a specification requirement Title 7. That specification requirement calls for a statement of the circumstances of the alleged discrimination. We do not have it in this case. This is important—I mentioned earlier, Your Honor, as to notice to us. I would say that it is also important for the court's purposes in deciding the relevancy of particular matters requested in the subpoena. In light of the *Mohasco*—in light of the obvious benefits that can be obtained by a clarification of the practices that have led EEOC to issue this broad commissioner's charge we think it is—must be viewed as a defective charge and the underlying subpoena, therefore, is unenforceable.

Now there was a reference here as to which confirmed my statement that the purpose of commissioner's charge related to possibly retaliation and a concern expressed that if there were retaliation and we were required to [36] disclose the names of the person the retaliation in the charge—the purpose of the commisioner's charge authority would be defeated. Your Honor, if EEOC has acted in this case, has issued that charge because of retaliation—possible retaliation to a person coming forward, that could easily be expressed in the charge without disclosure. It would provide a better understanding of exactly what prompted this commissioner's charge and I think that that is not the case here and I would not assume that EEOC by that argument is suggesting that any employee of this facility came forward and expressed concern about retaliation and I think the record that I've referred to earlier, the very commendable record of no charges whatsoever is still standing and I don't know whether that's an innuendo or assertion or whatever and I think it ought to be clarified.

One other point, procedural point relating to the *Dean Witter* decision, Your Honor. If a subpoena has been issued and there is a defect in the issuance of the subpoena, we're entitled, Your Honor, to an—for issuance of a subpoena and the commission must vote and approve on the issuance of a subpoena. We believe at best the *Dean Witter* requires that the commission reconsider, reconsideration of the issuance of the subpoena.

Finally, Your Honor, on the question of the Federal Reports Act, I want to clarify a statement. We believe [37] that if the commissioner's charging authority is being used as an audit device like the FCCP's authority then in fact it is covered by the new act. Generalized investigations are covered, OFCCP continues to be covered in the inquiries to the public so it's the underlying charges that we have made—the allegations we have made regarding the misuse of the commissioner's charging authority are valid with respect to the issuance of the use of the commisioners charge authority, then that authority would be subject to the Federal Reports Act and the Paper Work Reduction Act and approval of OMB would be required.

There's also further questions, Your Honor, I think that—

THE COURT: I think in view of the brief that I have here and the comments that you've made to date, the Court has a fair understanding of the issues and your position—

MR. SCHNEIDERMAN: Thank you, Your Honor.

MS. HARPER: Your Honor, I'd like to be fairly brief and—

THE COURT: It's always commendable.

MS. HARPER:—And I'd like to make several points. The first point I'd like to make is that despite Shell's characterization of this action what you have before you today is a simple action to enforce the subpoena. It is [38] not complex litigation, the standard for subpoena enforcement has been articulated in this Circuit and in the *Chrysler* case and in other circuits, the *University of New Mexico* case in the Tenth Circuit, it's been articulated by the Supreme Court. I'd like to just read to you from *Chrysler*. "A court faced with a command for enforcement is limited to determining whether the subpoena information is material and relevant to the investigation of a potential violation." They're citing from *Graniteville* saying that to look beyond that—to do otherwise would be not only to place the cart before the horse but to substitute a driver other than the one appointed by Congress and that is precisely what the defendant—what Shell here, excuse me, is trying to do is to look beyond what the agency has initiated by way of

commissioner's charge to look to see whether the agency's action in issuing the charge is based upon reasonable cause.

I believe Mr. Schneiderman just a moment ago said we have to have reasonable cause to issue a commissioner's charge and that is no longer true with the '72 amendment and reasonable cause was taken out of the act and a requirement placed simply that the commissioner swore to the charge. He wants to characterize that as a more stringent requirement. Most courts that have looked at it have not characterized it as so and in fact, *Dean Witter* looked at that issue specifically and said that it was not a more stringent [39] requirement.

Now we're prepared to call as witnesses here today the record custodian who can identify and authenticate all the jurisdictional matters that could be at issue. I don't know if Shell is contending that there isn't a charge, that you know—that it wasn't deferred or that they didn't get notice of it or anything along these lines and at the moment they haven't raised it in any of their answers or any of their pleadings so if you're prepared to stipulate that the charge exists and was deferred and was served we'd like to either offer those exhibits to the director's affidavit into evidence or we're prepared to put on testimony as to each of the many documents that are involved here.

THE COURT: Counsel, do you have any thought on the matter before I express an opinion?

MR. SCHNEIDERMAN: Your Honor, my concern is as to our objective in being here today was to assert a need to have some limited discovery before we would be in a position, Your Honor, to deal with the show cause. We believe as I said in the beginning that we need some limited discovery to provide a meaningful response to the show cause and the case law certainly does not preclude some limited discovery so I would say before we get into that, though, I think there might be areas that we might resolve that sometime in the future. We have come here with hopes and objectives of [40] securing that limited discovery.

MS. HARPER: And it is the commission's position that any discovery is improper. First of all, there is a plethora of case law which holds that an employer cannot inquire

into the basis of a charge. To allow that—to allow inquiry into the commissioner's basis for a charge is to allow Shell to do whatever the court that has ruled on this issue would not allow. It's a prolonged—it's to prolong the procedure that has been prolonged now well over a year. We have been seeking voluntary compliance and then since last September when the suit was initiated—it's just going to prolong it more. The standard for subpoena enforcement is whether we have the authority to issue a subpoena. I think clearly the agency does and I'm prepared to put the statutes into evidence and to answer their challenge that we have answered their challenge that the charge is insufficient.

THE COURT: I think you clearly have.

MS. HARPER: The other standard is that the subpoenaed information is not unduly vague. The defendant has never contended that they could not from the wording of the charge know what information is subpoenaed and if they were to raise that today I would have objected but I'd be delighted to answer. The only other standard for the court's review is whether the information subpoenaed is relevant on [41] the charge. I can cite to you language from *Graniteville* and *Local 104* that says that it is relevant but if the court wishes to do its own review of the charge versus the subpoena it's a mixed question of law; in fact, you can certainly look for yourself to see whether the information subpoenaed is relevant to the issue under investigation. I'm prepared to put on witness testimony to explain for the court's enlightenment any testimony that you do not understand the relevance of. The defendant again has never made any specific argument as to any specific subpoenaed item that that item is irrelevant to any specific issue. They didn't raise it in the administrative review process in its petition to revoke the subpoena. It wasn't addressed in any of the appeals of those petitions nor has it been addressed in their answer. They've made general allegations that the information is relevant, again this is all based on their challenge to the sufficiency of the charge. They cannot fairly argue that the charge does not put them on notice of

what's being investigated and we're prepared to argue all of that.

THE COURT: I think you're well-prepared and I don't think we need to get to that today. I want to give careful consideration to the arguments of the plaintiffs here but in all frankness and honesty, I'm inclined to think that the normal rule and the normal requirement of any court in handling questions of the sufficiency of the subpoenae is [42] narrow and limited to and to do more than that can only be done under special and unusual circumstances. You've indicated why you think that be true and the court wants to consider it carefully but in all fairness to everyone concerned, normally that would not be the case and normally the issuance of a subpoena by an agent or an official who has the statutory authority to do that would in and of itself be sufficient and of course, challenges to the sufficiency of the subpoena itself could be heard, its vagueness, its relevancy and so on, those are different matters handled every day by every Court in this building but you raised other issues which are different and I want to look carefully at the authorities you've cited to see if they hold and support your position. I don't think we need really any other testimony. I think you've covered it in your brief, the normal answers that we need as to those questions that raise questions regarding the surface deficiencies of the subpoena and—

MS. HARPER: We'd like to offer into evidence the exhibits and affidavits of the director, Mr. Mansfield.

THE COURT: That may be done.

MS. HARPER: And if Shell wants to waive objections to the admissibility of the amended charge which contains the date of the alleged violations in accordance with the language in a *Dean Witter* opinion—the actual copy of [43] the amended charge was not an attachment to the affidavit—

THE COURT: I see.

MS. HARPER: —Of the director so it would need to be in evidence for the court's consideration.

THE COURT: All right.

MS. HARPER: We'd like to offer into evidence as well—just a moment. Your Honor, would you like me to in-

troduce a new set of exhibits attached to the affidavit of the director to be marked into evidence or—

THE COURT: It might well be good to have one unified set just for the sake of symmetry and consistency. I have various files here because of the merger of a Illinois case and this case where we don't have them in an appropriate order so if you've got them in one—

MS. HARPER: I've got only one new set of the affidavit of the director with Exhibits A through N which is basically the charge, the petition to revoke and those sort of things and then I've got the three sets of the amended charge material which is the actual charge document amendment signed by the chair, Eleanor Norton.

THE COURT: That was signed some time ago and delivered to the party litigants here?

MS. HARPER: Yes, the parties all have copies of this exhibit and I've got a copy for everybody of the amendments and which we can have marked.

[44] MR. SCHNEIDERMAN: If I might, Your Honor, I don't see that we'll have difficulty resolving those issues but it seems to me that in due course in a short time, Your Honor, we'll be back here to resolve the particular questions of burdensome and relevancy that have been raised. I just want to point out it's important to recognize that we have in the record ample specific questions of the burdensomeness and relevancy.

THE COURT: Those are the kinds of things that we can answer usually without oral argument.

MR. SCHNEIDERMAN: With affidavits—

THE COURT: And I think the court will have no difficulty resolving those issues once we get to them. You're hoping I wouldn't get to them but—

MS. HARPER: I'm hoping you will so I know what I am responding to.

THE COURT: —And I understand that so I don't think there's any need for oral argument on the—

MR. SCHNEIDERMAN: I think that is satisfactory for us. I just don't see a need to stipulate particular items now, we'll both be submitting our particular documents.

THE COURT: Why don't you be sure that all parties have a copy and if you'll give me a complete file and you need not do it right this moment—

MS. HARPER: Well, I would like to offer these into [45] evidence because they will be necessary.

THE COURT: They may be offered into evidence and you may reserve your right to object. I wouldn't rule on them at this time.

MR. SCHNEIDERMAN: Thank you.

THE COURT: They are all considered offered into evidence.

MR. SCHNEIDERMAN: Are you going to give me a full copy?

MS. HARPER: I've provided Shell with three separate complete copies of that big package right there.

MR. SCHNEIDERMAN: Fine.

MS. HARPER: When I applied—the application for the order to show cause—that is the affidavit of the director and Exhibits A through N which I've just offered to the court. I'm sure you have three separate copies of it because I forwarded it myself. If you'd like me to recopy it for some reason I'll be delighted to do so.

THE COURT: All right. I think this will be sufficient and this will be helpful to the court and when we—it should not take the court long to resolve the issues that have been argued today. I expect to rule on this quickly.

MS. HARPER: We would just like to stress—I don't know how much we can stress this, but we would like to stress we just do not believe that there is any case law [46] supporting the proposition that discovery into the sufficiency of the charge is proper. It takes my breath away to think that we would have to respond to discovery requests, looking into how other charges are dropped, that we might according to the defendants' schedule or according to Shell's schedule—they want to depose employees of the commission about how charges are selected for systemic programing and that is a matter of public record, it is published and if they want—surely they know that that is not proper discoverable areas.

THE COURT: Well, Counsel, I think you learn as I have over the years, too, that these unique and unusual cases are quite common in all of the litigation that we have today. Things are not done routinely anymore in anything—even the simplest kind of motions turns into an argument that even the proverbial lawyers would have difficulty resolving.

MS. HARPER: That is the simplest kind of argument.

MR. SCHNEIDERMAN: Your Honor, would you care for any post-hearing brief at all?

THE COURT: No, I think not. I don't think we would need it at this time.

MR. SCHNEIDERMAN: Okay.

THE COURT: My hope is we'll resolve this matter quickly and you'll have my initial ruling within the next ten days or so so it shouldn't take a very long time.

Court's now in temporary recess.

(Proceedings were thus concluded.)

[47]

REPORTER'S CERTIFICATE

I, Lynn Shrum, Official Court Reporter for the United States District Court for the Eastern District of Missouri, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that to the best of my ability the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/S/ LYNN SHRUM
LYNN SHRUM

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action
No. 81-230-C(1)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPLICANT,

v.

SHELL OIL COMPANY, ET AL. RESPONDENTS.

FIRST INTERROGATORIES OF RESPONDENT SHELL OIL COMPANY TO APPLICANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent Shell Oil Company hereby requests Applicant Equal Employment Opportunity Commission ("EEOC") to answer separately and fully in writing under oath, within thirty (30) days after service hereof, the interrogatories hereafter propounded in accordance with Rule 33 of the Federal Rules of Civil Procedure. These interrogatories should be deemed continuing so that Applicant is obliged to furnish supplemental answers if it obtains additional or different information between the time its answers hereto are filed and the hearing of this cause.

DEFINITIONS

As used in these interrogatories, the following terms have the meanings set forth below:

A. "EEOC" or "Commission" means the Equal Employment Opportunity Commission, defendant herein, and its members, officers, employees, and agents.

B. "OMB" means the Office of Management and Budget and its director, employees, and agents.

C. "GAO" means the General Accounting Office, the Comptroller General of the United States, and the employees and agents of the General Accounting Office.

D. "Staff Member" of the Commission means any officer, agent, or employee of the Commission but does not include the Commissioners. Unless otherwise indicated, such term shall be read to include both present and former Commission staff members, and where an interrogatory relates to an assignment or area of responsibility of any Commission staff member, it includes the past as well as the present. The term "assigned" when used in reference to a Commissioner or staff member means any formal or informal designation or appointment of such person (whether orally or in writing) to exercise functions, responsibilities, or duties with respect to a particular subject or in a particular job.

E. The term "person" refers to the plural as well as the singular of any individual, partnership, association, corporation, business trust, legal representative, organized group of persons, state or territorial government or branch, or political subdivision of a state or territory or a branch of a political subdivision.

F. "Identify" or "Identification":

1. When used in reference to a document, means:
   (a) Its date;
   (b) Its author or authors;
   (c) Its intended and all actual addressees and receipients;
   (d) Its length in pages; and
   (e) Its present location and custodian.
2. When used in reference to a conversation, speech, or testimony means:
   (a) The names of each person present;
   (b) The date or approximate date on which it occurred;
   (c) Where it occurred and, in the case of a conversation, whether it was face-to-face or by telephone and, if by telephone, where each of the parties to the conversation was located;
   (d) The substance of the conversation, speech, or testimony, in detail, stating who made each statement related; and

(e) Identification of each document which records, relates or refers to, or summarizes the conversation, speech, or testimony.

3. When used in reference to a person, means the person's name, last known home and business address, last known home and business telephone number, present business affiliation, and business affiliation during the time to which the interrogatory refers. The identification should be sufficient so as to enable plaintiff to notice a person's deposition under Rule 30 of the Federal Rules of Civil Procedure, or to subpoena said person pursuant to Rule 45 of the Federal Rules of Civil Procedure.

4. The term "document" means originals or any exact copies of written, recorded, transcribed, punched, filmed, taped, or graphic matter of every type and description, from whatever source derived and however and by whomever prepared, produced, reproduced, disseminated or made, including, but not limited to, any studies, reports, notes, memoranda, minutes, statements, comments, speeches, testimony, letters, notebooks, drafts, data sheets, work sheets, records, statistics, charts, tapes, data processing sheets or cards, or other paper or writing in EEOC's possession, custody, or control. The term "document" also means exact copies or reproductions of all the foregoing items upon which notations in writing, print, or otherwise have been made which do not appear on the originals. To the extent that data processing cards, magnetic tapes, or other computer-related materials are produced, produce all programs, instructions, and other similarly related information necessary to read, comprehend and otherwise utilize said data processing cards, magnetic tapes or other computer-related materials.

G. The "Federal Reports Act" means the Act as amended, 44 U.S.C. § 3501-12, the legislative history of the Act, as amended, and formal and informal rules, regulations, manuals, orders, opinions, or other instructions, directives, decisions, understandings or agreements of, be-

tween, or among OMB, GAO, or EEOC in connection with administration of, enforcement of, or compliance with the Act, as amended.

H. "Commissioner Charges" means one or more charges filed by an EEOC Commissioner pursuant to authority contained in Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended.

I. "Individual charges" means one or more charges filed "on behalf of a person [or persons, as defined in section 701(a) of Title VII] claiming to be aggrieved" under section 706(b) of Title VII of the Civil Rights Act of 1964, as amended.

GENERAL INSTRUCTIONS

A. In lieu of identification of any document, the said document may be produced by Applicant for inspection and copying by Shell Oil Company. To the extent that any document so produced is responsive to more than one interrogatory herin, only one copy of such a document need be produced.

B. Unless the context of the interrogatory specifically states otherwise, references to the singular include the plural, references to the plural include the singular, references to one gender include the other gender, references to the past tense include the present, and references to the present tense include the past.

INTERROGATORIES

1. With respect to EEOC's issuance of its October 26, 1979, "FIRST REQUEST FOR INFORMATION RESPONDENT SHELL OIL COMPANY, WOOD RIVER REFINERY CHARGE NO. 072800036," *separately, for each of the questions number 1 through 33:*

(a) Indicate whether EEOC has asked or is currently asking the same or a substantially identical question of ten or more persons, including Shell Oil Company, in connection with EEOC investigations of Commissioner Charges.

(b) Indicate whether EEOC has asked or is currently asking the same or a substantially identical question

of ten or more persons in connection with EEOC investigations of individual charges.

(c) Indicate whether EEOC has asked or is currently asking the same or a substantially identical question of ten or more persons, including Shell Oil Company, in connection with EEOC investigations of Commissioner Charges and individual charges.

2. Identify (by pertinent pages, parts, or sections) all EEOC documents, including manuals, directives, form books, form interrogatories, clauses, and clause books, that contain proposed, suggested, or specified clauses, questions, or interrogatories for use in EEOC audits or investigations pursuant to Title VII of the Civil Rights Act of 1964, as amended.

3. Were any or all of the questions or subquestions in the First Request for Information in this case based upon or derived from any documents identified in response to Interrogatory 2 above?

4. If the answer to Interrogatory 3 is "yes," identify (by pertinent pages, parts, or sections) the documents on or from which the questions or subquestions in the Request for Information were based or derived.

5. Identify all Requests for Information and Subpoenas issued by EEOC between January 1, 1976, and the present to parties charged by an EEOC Commissioner pursuant to Title VII of the Civil Rights Act of 1964, as amended. To protect confidentiality, names of charged parties or other references disclosing the identities of charged parties may be deleted wherever they appear in the Requests or Subpoenas.

6. Identify all Commission members and staff members assigned responsibility between January 1, 1976, and the present with respect to administration of, enforcement of, or compliance with the Federal Reports Act.

7. Identify all documents in EEOC's possession pertaining to the possible application of the Federal Reports Act to EEOC Requests for Information and/or subpoena requests. Include all documents, including correspondence, produced by OMB, GAO, or EEOC, alone or jointly.

8. Identify all conversations among staff members, Commission members, or staff members and Commission members, within the Commission, or with OMB or GAO, or both, pertaining to the possible application of the Federal Reports Act to EEOC Requests for Information and/or subpoena requests.

9. Identify all documents and conversations pertaining to EEOC's inquiries of GAO, and vice-versa, concerning the relationship between the Federal Reports Act and EEOC's Request for Information issued to Shell in this case.

10. Identify all documents and conversations pertaining to EEOC inquiries of OMB, and vice-versa, concerning the relationship between the Federal Reports Act and EEOC's Request for Information issued to Shell in this case.

11. Identify all Commission documents, conversations, speeches, and testimony, including rules, regulations, manuals, orders, opinions, or other instructions, directives, decisions, agreements or understandings, formal or informal, pertaining to proposed or specified goals, quotas, or other objectives for recommending, preparing, or filing a proposed or specified number of Commissioner Charges during proposed or specified periods of time.

12. Indicate whether EEOC has a system, program, or standard for recommending, preparing, or filing a proposed or specified number of Commissioner Charges during a proposed or specified period of time.

13. If the answer to Interrogatory 12 is "yes," explain how such a system, program, or standard is implemented.

14. Identify all documents, conversations, speeches, and testimony indicating, suggesting, or certifying that EEOC staff members have received or may receive performance bonuses or merit awards of any kind whatsoever in partial or total recognition of the staff members' abilities to meet EEOC goals, quotas, or other standards or objectives pertaining to recommending, preparing, or filing a proposed or specified number of Commissioner Charges during proposed or specified periods of time.

15. Aside from the charge in this case, are there any Commissioner Charges now pending against specific plants, facilities, divisions, locals, or offices of employers or labor

organizations who had 1,500 or more employees or members at the time of filing against them of the pending Commissioner Charges and who were not subjected to individual charges against the same plants, facilities, divisions, locals, or offices during the five-year periods prior to filing against them of the pending Commissioner Charges?

16. If the answer to Interrogatory 15 is "yes," indicate how many such charges are now pending, and the charge number, filing date, and charging Commissioner listed on each charge.

17. For each charge listed in response to Interrogatory 16, identify the charging documents and notices of charges that were provided to the parties charged. To protect confidentiality, names of charged parties or other references disclosing the identities of charged parties may be deleted wherever they appear in the charging documents or notices.

Respectfully submitted,

W. STANLEY WALCH
CHARLES A. NEWMAN
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(314) 231-7676

/s/ _____
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SAMUEL T. PERKINS
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ATTORNEYS FOR SHELL OIL COMPANY

OF COUNSEL:
SUSAN J. SANDLER
SHELL OIL COMPANY
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001

Dated: March 9, 1981

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action
No. 81-230-C(1)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPLICANT,

v.

SHELL OIL COMPANY, ET AL., RESPONDENTS.

RESPONDENT SHELL OIL COMPANY'S FIRST REQUEST TO INSPECT AND COPY DOCUMENTS PURSUANT TO FEDERAL RULE 34

Respondent Shell Oil Company requests Applicant Equal Employment Opportunity Commission, within thirty (30) days from the date of service hereof, to produce and permit Shell Oil Company to inspect and copy each of the documents which are specified herein. This request should be deemed continuing so that the Applicant is obliged to supplement its response hereto if it obtains additional documents between the time its response hereto is filed and the hearing of this cause. Documents Specified:

All documents identified by Applicant in response to Respondent Shell Oil Company's first interrogatories served upon Applicant on March 9, 1981. These documents should be produced as they are kept in the usual course of business or should be organized and labeled to correspond with the categories in Respondent's first interrogatories.

Respectfully submitted,

/s/

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OF COUNSEL:
Susan J. Sandler
Shell Oil Company
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001

Dated: March 9, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "First" Interrogatories of Respondent Shell Oil Company to Applicant Equal Employment Opportunity Commission" and "Respondent Shell Oil Company's First Request to Inspect and Copy Documents Pursuant to Federal Rule 34" were served by United States Mail, First Class, Postage Prepaid, this 9th day of March, 1981, to:

DIANNA B. JOHNSTON, ESQUIRE
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

and

DONNA L. HARPER, ESQUIRE
Trial Attorney
Equal Employment Opportunity Commission
St. Louis District Office
625 N. Euclid
St. Louis, Mo. 63108

MARK B. GOODWIN

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ILLINOIS

Civil Action No. 81-5020

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPLICANT,

v.

SHELL OIL COMPANY AND ROGER RICE, RESPONDENTS.

APPLICANTION FOR ORDER TO SHOW CAUSE WHY A SUBPOENA SHOULD NOT BE ENFORCED

1. This is an action for enforcement of a subpoena *duces tecum*, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. C. Section 2000e-9.

2. Jurisdiction is conferred upon the Court by Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. Sections 2000e-5(f)(3) and 9.

3. Applicant Equal Employment Opportunity Commission is the federal agency charged with administration and enforcement of Title VII, including, *inter alia*, the investigation of charges of unlawful employment practices.

4. Respondent Shell Oil Company is a Delaware corporation doing business in the states of Missouri and Illinois with facilities in Wood River, Illinois.

5. On May 15, 1980, Applicant issued its subpoena *duces tecum* No. SL-80-35 directed to Respondent Shell Oil Company's agent, Roger Rice. That subpoena was served on Respondents on May 16, 1980. It required Respondents to produce evidence needed as part of Applicant's investigation of a charge of unlawful employment practices which had been filed against Respondent Shell Oil Company.

6. On May 23, 1980, Respondent mailed its Petition to Revoke or Modify Subpoena No. SL-80-35.

7. On June 9, 1980, Applicant denied Respondent's Petition.

8. On June 26, 1980, Applicant received Respondent's Appeal of Determination on Petition to Revoke or Modify Subpoena No. SL-80-35.

9. On August 19, 1980, Applicant denied Respondent's Appeal.

10. To date, Respondent has failed and refused to comply with the subpoena.

WHEREFORE, the Equal Employment Opportunity Commission prays:

(a) That an order to show cause be issued forthwith directing respondents to appear before this Court on a day certain, to be fixed by said Order, and to show cause, if there be any, why an order should not be issued directing Respondents to comply with the subpoena;

(b) That, upon return of said Order to Show Cause, an order be issued directing Respondents to comply with the subpoena; and

(c) That the Equal Employment Opportunity Commission be granted such further relief as may be necessary and appropriate.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JAMES N. FINNEY
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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JAAMES R. NEELY, JR.,
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DONNA L. HARPER
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IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ILLINOIS

Civil Action No. 81-5020

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPLICANT,

v.

SHELL OIL COMPANY AND ROGER RICE, RESPONDENTS

STATE OF MISSOURI
CITY OF ST. LOUIS

AFFIDAVIT OF W. ED MANSFIELD

I, W.Ed Mansfield, being duly sworn on my oath, do depose and say:

1. I make this Affidavit in support of the Application of the Equal Employment Opportunity Commission (hereinafter EEOC or "Commission") for an Order to Show Cause why a subpoena *duces tecum*, served by the Commission on the Respondents, should not be enforced.

2. I make this Affidavit on the basis of my own personal knowledge and my review of the Commission's investigative file entitled *Eleanor Homes Norton* v. *Shell Oil Company*, charge number 072800036.

3. I am the District Director of the EEOC's St. Louis District Office and as such I am the custodian of the Commission's investigative files in this office.

4. The St. Louis District Office is responsible for the investigation of charges alleging that employers, within the judicial districts of the Eastern District of Missouri and the Southern District of Illinois have committed employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq*.

5. On October 16, 1979, EEOC Commissioner and Chair, Eleanor Holmes Norton filed a charge under oath with the St. Louis District Office alleging that Shell Oil Company (hereinafter Shell) had unlawfully discriminated against Blacks and females in violation of Title VII, at its facilities

in Wood River, Illinois. A copy of the charge is attached hereto as Exhibit A (2 pages).

6. Upon receipt of the charge the Commission assigned it charge number 072800036.

7. On October 23, 1979 this office sent notice of the charge to the Illinois Fair Employment Practice Commission. A copy of that notice is attached hereto as Exhibit B. EEOC advised the Illinois Commission that EEOC would take primary responsibility for processing the charge, as had been previously agreed in the Worksharing Agreement between the two Commissions. A copy of the Worksharing Agreement is attached hereto as Exhibit C.

8. On October 26, 1979 this office served notice and a copy of the charge on Shell, pursuant to Section 706(b) of Title VII, as amended, 42 U.S.C. Section 2000e-5(b). This notice is attached as Exhibit D. Along with this notice and a copy of the charge was sent a two page cover letter explaining the investigation, and a request for information (Exhibits E and F, respectively).

9. During the period from November 30, 1979 to April 28, 1980, a total of seven letters were exchanged between my office and Shell after the initial meeting with Shell's representatives on November 28, 1979. These letters are grouped together and are attached as Exhibit G consisting of 27 pages.

10. Because efforts at gaining Shell's voluntary compliance from October 1979 to May 1980 were unsuccessful, and in furtherance of the investigation of the charge, on May 15, 1980, I issued for the Commission a subpoena *duces tecum* requiring the Respondent to produce certain evidence on May 28, 1980. This subpoena was served by registered mail on May 15, 1980, and was issued pursuant to Section 710 of Title VII, 42 U.S.C. Section 2000e-9, and Section 1601.15(a), EEOC Procedural Regulations, 29 C.F.R. Section 1601.15(a)(1973). A copy of that subpoena is attached hereto as Exhibit H. Copies of the proof of service, registered mail logs, and registered mail receipts showing delivery on May 16, 1980 are grouped together and attached as Exhibit I.

11. The Respondent timely served the Commission with its Petition to Revoke or Modify Subpoena No. 80-35, attached hereto as Exhibit J. The Commission issued its Determination on 6/9/80, denying Respondent's Petition on June 9, 1980 (Exhibit K). Respondent next requested and was granted an extension of time in which to file its Appeal of Determination on its Petition to Revoke or Modify (Exhibit L). A final agency Determination on the Appeal was issued on August 19, 1980 denying Respondent's Appeal and requiring compliance with the subpoena on September 18, 1980 (Exhibit M).

12. On September 18, 1980, Respondent failed to comply with the subpoena, and instead filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Eastern District of Missouri, Eastern Division, Civil Action No. 80-1202-C(5), and caused a summons to be served upon affiant (Exhibit N). To date Resondent has failed to comply with subpoena.

Further affiant sayeth not.

I swear that the preceding affidavit consisting of 3 pages, 12 paragraphs is true to the best of my knowledge.

/s/ _____

W. ED MANSFIELD
District Director

Subscribed and sworn to before me this 29th day of January 1981.

/s/ _____

PHYLLIS WESTER
Notary Public

EXHIBIT D—NOTICE OF CHARGE

U.S. EQUAL OPPORTUNITY COMMISSION
ST. LOUIS DISTRICT OFFICE
1601 OLIVE STREET
ST. LOUIS, MISSOURI 63103

EEOC Charge No 072800036

To: 072800036
Shell Oil Company
Attn: Porter Slack, Mgr. of Ind. Relations
P.O. Box 262
Wood River, Ill
62095

NOTICE OF CHARGE OF DISCRIMINATION AND REQUEST FOR INFORMATION

(See Section 1602.14, EEOC Rules and Regulations, and Section 704(a), Notice of Non-Retaliation on reverse)

You are hereby notified that the attached charge of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et. seq., has been filed against you.

You are requested to cooperate in the investigation of this charge by complying fully with the attached request for information which pertains to the allegations contained in this charge. You may, in addition, submit in writing a statement of position or other evidence with respect to the allegations. Such information will be made a part of the file and will be considered by the Commission during the course of this investigation. Telephone communications cannot be made a part of the record.

In addition to complying with the request for information mentioned above, your attention is directed to Section 1602.14 of the Commission's Regulations which requires the preservation of all personnel records relevant to this charge until a final disposition of this charge is made and to the non-retaliation requirements under Section 704(a) of the Civil Rights Act.

For future correspondence on this matter, please use the charge number shown above.

Certification. I hereby certify that I mailed the original of this Notice, a copy of the charge and request for information referenced herein to the addressee herein.

/s/

W. ED. MANSFIELD

EXHIBIT E—LETTER FROM W. ED MANSFIELD
(Oct. 26, 1981)

October 26, 1979

Shell Oil Company
P.O. Box 262
Wood, River, Illinois 62095

Attn: Porter Slack, Manager

Re: Charge No. 072800036
COMMISSIONER NORTON

v.

SHELL OIL COMPANY

Dear Mr. Slack:

A preliminary study of available data indicates that Shell Oil Company, Wood River Refinery, may be pursuing employment practices which do not afford women and blacks equal opportunity or which have a discriminatory effect. A Commissioner's charge, copy enclosed, has therefore been duly issued.

This does not in any respect constitute a final finding of a violation. Upon the filing of the charge it is the statutory duty of the Commission to conduct a full and impartial investigation for the purpose of determining whether the facts and circumstances afford reasonable cause for the Commission to believe that Shell Oil Company's employment patterns and practices constitute discrimination on the basis of sex and race.

It is the intention of the Commission to conduct its investigation with minimal possible interference with the normal operations of your establishment, consistent with adequately discharging the Commission's statutory duties. To this end, enclosed are a series of written questions from the Commission's investigatory staff. The questions concern those matters which are the subject of investigation.

We are requesting that you review the enclosed material and contact Ms. E. Thomas, Equal Opportunity Supervisor, on or before October 31, 1979, for purposes of arranging a mutually convenient date for discussing the specific format

of your compliance with the enclosed First Data Request. If all or part of your response will be drawn from computerized records, please bring with you to that meeting the answers to questions 29 through 33 and arrange the attendance of a member of your staff who is conversant with the nature and scope of your computer base.

At the end of this meeting, we will establish a mutually agreeable return date for the requested information. The telephone number is (314) 425-4946.

Sincerely,

/s/ _____

W. ED. MANSFIELD
District Director

Enclosures: First Data Request
Commissioner's Charge
Notice of Charge

WEM:DLH:sf
Certified No. 4949491

EXHIBIT F

FIRST REQUEST FOR INFORMATION
RESPONDENT *SHELL OIL COMPANY, WOOD RIVER REFINERY*
CHARGE NUMBER 072800036

The Respondent *Shell Oil Company*, hereafter referred to as *Shell*, is respectfully requested to submit the following information regarding the above mentioned charge.

Please identify each answer by using the number of the question to which it responds, and present the answers in numerical order. Also please identify, separately for each question, and in a manner suitable for use in a request for production of documents, all sources of information (whether human, documentary or other) and all records maintained by the company or other person or organization on which the company relies in answering the questions.

For purposes of answering these questions, the race/ethnic identification is identical to that used by the company in reporting on EEO-1 forms.

This request for information does not necessarily represent the entire body of evidence which we will need to obtain from your organization in order that a proper determination as to the merits of the charge can be made. Please state the name, job title, address and telephone number of the person(s) designated to answer the request on behalf of the company and to whom future inquiries on this matter are to be sent.

It shall be understood that this First Data Request is a continuing request. Thus, should any policy or practice within the scope of these questions change significantly after these questions are answered, you are requested to provide a full discription of the change as soon thereafter as possible.

(Single Establishment Charges)

1. *Identification of Facility*—State the name, address, and telephone number of the facility charged. Indicate any changes in the location of the facility since 1965.

2. *Corporate Structure*—Describe the nature of the business at the charged facility. If the charged facility is part of a multi-establishment employer, give the name and address of the company headquarters office. If the charged facility is part of a conglomerate, give the relationship of the charged facility to the parent company (subsidiary, affiliate, etc.) and the name, address and nature or business of the parent company. Supply a copy of the 1978 annual report or informational brochure, if available.

3. State the name, title, and telephone number of the senior official at the charged facility.

4. State the name, title and telephone number of the official(s) who have had overall responsibility for recruitment, hiring, initial assignment, promotion, training, and termination since 1976. Include the time period when such responsibility was exercised and describe the scope of that responsibility.

5. *Facility Organization*—Supply an organizational chart or list of all sections, departments, divisions, or any other organizational subgroups in the facility, arranged to display the lines of authority. Name the individual in charge of each group or subgroup on the chart or list, and describe the function of each group or subgroup.

6. *Union Affiliation*—For the period 1976 to present, provide the name and address of each labor organization which has represented your employees, the name and address of each business agent or similar representative of each, and the name of any regional, national, or international organization with which each is affiliated. Indicate which of the job titles found in the facility are in the bargaining unit represented by each union. Supply copies of all collective bargaining agreements together with any letters of understanding or other clarifying documents, in effect at any time since 1976. If any labor organization participates in recruitment, promotion, upgrading, transfer, training, or layoff procedure in ways not specified in the contracts, please describe such participation. If apprenticeship programs are conducted with respect to any jobs covered by any collective bargaining agreement, please supply for the period 1/1/77 through 4/1/79, records which show, for appli-

cant or employee eligible for such program, name; race; sex; whether allowed to enter program; date of entry; date of completion, (or current status, e.g. 2d year apprentice); date leaving program, (whether unsuccessful or voluntary); duration of program; entry requirements; reasons for rejection/incompletion.

7. *Summary of Workforce*—For each section, department, division, and/or other subgroup in Question 5, provide a summary listing of all job titles within each such unit. The summary should list official and manager positions in order of authority and other job titles by wage rate or salary level within EEO-1 category. For each job title, include job code, method of compensation (hourly, biweekly, weekly), salary grade or level and range for salaried employees (if there is no established range for the job, provide information on the actual salary range of persons in the job) and wage rate or labor grade for hourly employees, total number of *permanent* full-time employees, and the sex and ethnic identification of those employees. Indicate for each job title the approximate number of vacancies in the last three years and the estimated percentage of openings in the job title that are typically filled by promotion. Provide a separate listing for each year 1979 to 1981 as of 4/1/79.

8. (a) How many temporary employees were employed as of 4/1/79? In what jobs and organizational subgroups (described in Question 5) were they employed?

(b) How many part-time employees were employed as of 4/1/79? In what jobs and organizational subgroups were they employed?

9. *Job Descriptions*—For each job title in Question 7, please provide copies of all job descriptions or other documents which indicate the duties, responsibilities, and components of the job, and the education, skill, experience, and other qualifications that are used as a basis for hiring, promotion, or other employment decisions for that job title.

10. *Affirmative Action Plans*—Attach a copy of the facility's Affirmative Action Plan and supporting data for each year 1976 to 1979 for the charged facility. If there are

none, so state. If Respondent is a government contractor, give the name and address of the compliance office.

11. *EEO-1 Data*—Supply a copy of the facility's EEO-1 Employer Information Report for 1978 and 1979 (we have 70-77).

12. *Copies of Company Documents*—Submit a copy of the following company documents, used at any time in the last two years:

(a) Forms used in the application and hiring process, including, but not limited to applications, applicant evaluation forms and interview forms.

(b) All other personnel-related forms, including but not limited to those used in the transfer, promotion, pay change, training, evaluation or termination of employees.

(c) All manuals of personnel procedures (such as employee handbooks, supervisor's manual, manuals of personnel policies and procedures, and complaint or grievance policies), including sections relating to selection criteria, hiring, promotion, training, transfer, and termination.

(d) All written memoranda which, at least in part, describe Company personnel policies and procedures.

(e) Health, pension and retirement plan, leave regulations and other fringe benefit plans not included in existing collective bargaining contracts, including those relating to maternity benefits.

(f) Salary administration plan, including description of salary groups, labor grades and salary ranges in existence from 1976 to present. Also provide all job analyses, job descriptions, job standards, and any other documents used to set salary or wage levels and rates for each job.

Personnel Reports

13. Describe and provide copies of your most recent seniority rosters by department/division; any reports regularly or specially prepared by the company during the past two years on personnel-related activities, such as reports on the number of persons hired, transferred, promoted, or

terminated; reports concerning employee turnover and projections of future hiring; rosters or reports concerning the seniority (date of hire), job classification (current and at hire), sex, race, and/or ethnic status of all minority/female employees reported on your 1978 (or 1979) EEO–1 report; and reports compiled for internal EEO purposes. Describe the records used to prepare the reports, indicating the period of time for which they are maintained and state the name and title of the person responsible for each report.

14. *Selection Process*—Attach a copy of any written criteria or standards used in connection with evaluating candidates for hire, assignment, transfer, promotion, or training which have not been supplied in response to Questions 9 and 12.

15. *Selection Criteria*—State your policy regarding each of the following criteria and indicate for each 1) whether the Company solicits the information and how the information is obtained, 2) whether the Company utilizes the information obtained in its employment decision, 3) the weight given the criterion, and, 4) the jobs for which the criterion is used.

a. Arrest records
b. Conviction records
c. Credit or financial checks
d. Recommendations from previous employers
e. Personal references
f. Military record/Veterans Preference
g. Previous salary or income
h. Marital status
i. Number and ages of children
j. Friends and relatives in the company
k. Height and weight
l. Supervisory recommendations

16–18. Selection Criteria—Tests

16. Identify each paper and pencil or formal performance measure (hereinafter "test") used at any time since 1976 in connection with any hiring, assignment, promotion, transfer, or training decision and identify the job titles for which

it is used and the time period when it was used. Attach a copy of each test and/or rating device.

17. For each test identified in Question 16, provide the following information:

a. The scoring procedures used;

b. The specific manner in which the test results are used in making employment decisions;

c. The acceptable test score or rating for each purpose for which the test is used;

d. The ethnic, racial, and sex breakdown of all persons who took the test, indicating whether they achieved an acceptable score or not;

e. The final disposition as to each candidate;

f. The job title and name of the person responsible for administering the test.

18. For each test identified in Question 16, indicate whether a validation study was done, and if so, provide the following information:

a. The date of each study;

b. The results of each study;

c. The name and address of the person or organization conducting each study; and

d. A copy of each study including all relevant documents and attachments.

19. Special Benefits

a. List all private clubs or other social organizations for which you have purchased membership(s) for the use of employees in the past five years, giving name of club, address, membership qualifications, names and titles of persons in whose name membership is (was) held, if not in name of company.

b. If automobiles are purchased or leased for exclusive use of employees, list all such employees, giving name, title, race/sex/national origin.

20. *Recruitment*—For the period 1976 to date, please state:

a. Whether the Company has utilized newspaper or other media advertising when seeking applicants for

vacant positions; if so, please identify the name and address of each newspaper or other media, the date(s) on which each was so used, and th ejob(s) to be filled on each date;

b. Whether the Company contacted high schools, technical schools, colleges and/or universities for the purpose of encouraging applications or interviewing applicants; if so, please state the name of the institution, the dates of each such contact, the nature and extent of the contact, and the job(s) involved in each occasion;

c. Whether the Company has contacted public or private employment agencies for the purpose of recruiting applicants for its positions; if so, please identify the name and address of each such employment agency, the dates of each contact, the nature and extent of each such contact, and the job(s) involved on each occasion;

d. Whether the company has contacted specialized organizations such as women's or minority groups for the purpose of recruiting applicants; if so please identify the group, dates of the contact(s), and the jobs involved on each occasion;

e. Whether the company utilized incumbent employees as a recruitment source for applicants, if so, describe any bonus or incentive used to encourage employee referrals, and indicate for which jobs this source was used.

f. What other sources, if any, the company has used in seeking applicants; if such other sources have been used, please identify the name and address of each source, the dates of each contact, the nature and extent of each contact and job(s) involved on each occasion.

g. Please append copies of any informational booklets, brochures, or literature distributed during any recruitment programs, or available to some or any applicant for employment.

21. RECRUITMENT - In the chart below listing traditional sources of recruiting applicants, indicate by job level, for the period 1976 to present, what percentage of new hires come from each source. Each vertical column should total 100%. On a separate page, describe the special conditions or limitations or each recruitment source used and any additional comments regarding their use, if any.

	Off/Mgrs	Prof	Tech	Sales	Clerical	Craft	Oper	Labor	Serv
1. Self-Referral, walk or write-in									
2. Public Employment Agency									
3. Private Employment Agency									
4. Employee Referral									
5. College or University									
6. Tech, Vocational, H.S.									
7. Media or Ads									
8. Minority-Female Organizations									
9. Professional Organizations									
10. Corporate Recruiting Firms									
11. Industry Sources									
12. Referral Unions									
13. Other									

22. LIST OF PERSONS HIRED - Please provide the following information on all persons hired during the period January 1977 through January 1979 grouped by EEO-1 category and job title and within job title by date of hire.

EO-1 Category	Job Title and Job Code	Dept	Starting Salary (Level and Amt) or Wage Rate	Status	Date of Hire	Name	Race	Sex	Job Applied for	Date of Appl.	Recruitment Source

Status - Full-time, Part-time, Temporary
Recall, Re-Hire

23. LISTING OF APPLICANTS NOT HIRED

Please provide information on all applicants not hired, including college recruits, grouped by EEO-1 category and then by date of application. (same time period as #22)

EEO-1 Category	Job Applied For	Date of Appl.	Name of Applicant	Race/Sex	Recruitment Source	DISPOSITION: If not hired, provide reason for rejection If application held pending further consideration, state time period retained

Recruitment Sources: Self referral, public employment agency, private employment agency, employee referral, college or university, vocational or trade school, media ads, minority or female organizations, referral unions, industry sources, professional organizations, recruiting firms, or other (please state)

24. LIST OF PROMOTIONS - For the period 1/77 through 1/79, list all promotions, grouped by EEO-1 category, and job promoted to and then be date of promotion. Promotion refers to any permanent change from one job to another job with a higher maximum rate of pay. Do not include routine salary increases or upgrades.

Name of Employee	Race/Sex	Date of Promotion	Job Promoted To				Previous Job	Date of Hire
			EEO-1 Category	Job Title & Job Code	Dept	Salary (level and Amt) or Wage Rate	EEO-1 Category, Job Title, Dept. Salary (Level & Amt) or Wage Rate, Years in this title	

25. SPECIAL PROGRAMS - Attach description of each program, including size, cycling, procedure for informing employees of program, application procedures, eligibility, curriculum length, placement following completion as appropriate.

Training Programs (by name of program. List all groups during past 3 years	Total ✓			Black ✓		SSA		Other Min.		White		Dates of Program	Describe qualifications for selection, & job(s) for which participants are trained.
	All	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		
Tuition Refund (Report usage in past 3 years													
Other													

26. LISTING OF SEPARATIONS - List all separations for the period 2/1/78 through 1/31/79, grouped by EEO-1 category and job title and then by date of separtion.

JOB SEPARATED FROM									
EO-1 ategory	Job Title and Job Code	Dept.	Salary	Date of Separation	Name	Race	Sex	Date of Hire	Reason for Separation

27. SUMMARY OF SEPARATIONS - For the period 2/1/78 through 1/31/79, provide information on all separations grouped by EEO-1 category and Job Title.

EEO-1 Category	Job Title	Total Separations	Male	Female	Black		Hispanic		Other Minority		White	
					Male	Female	Male	Female	Male	Female	Male	Female

28. *Records Maintained*

a. Describe all records, documents, and reports that are maintained by the facility or maintained elsewhere pertaining to the facility concerning applicants and hires, including but not limited to such records as applicant logs, applications, interview records, initial assignment records, and summary reports of applicants and/or hires. For each type of record describe all the information on the record and whether the record includes race and/or sex-identification.

b. Describe all documents, records, and reports maintained by the facility or maintained elsewhere pertaining to the facility which reflect summarized and/or individual information on:

1. Persons who sought promotion or transfer
2. Persons selected for promotion or transfer
3. Reasons for selection or non-selection of persons for promotion or transfer
4. Persons identified by the company as "promotable"

c. Describe all documents, records, and reports maintained by the facility or maintained elsewhere pertaining to the facility which reflect information on employee personnel history including but not limited to individual job, salary, location or organizational changes, status changes, and reasons for separation.

29-33. cf2 Computerized Data

29. State whether Respondent currently maintains or has maintained, or any other entity currently maintains, any computerized file or files which contain any of Respondent's personnel information, such as personnel, payroll, seniority, work history, etc. If so, identify and provide the following information separately for each such file:

(a) The name of the file and the date Respondent started using the file and the date that the use of the file was discontinued;

(b) The name, model number, configuration, and location of the computer on which the file is run;

(c) Whether the file contains information on all of Respondent's employees;

(d) If not, the categories of employees on which the file contains information;

(e) Whether the file contains information on inactive and/or terminated employees and for how long such employees are retained on the file;

(f) The time and method by which the file is purged of inactive and/or terminated employees; and state how, where, and on what medium the data as to the inactive and/or terminated employee is then stored;

(g) The medium on which the file is kept (e.g. tape, disk, cards, etc.);

(h) The number of types of records on the file; the name of each type; the minimum and maximum number of each type; and when and how each type of record is generated;

(i) For each type of record, the name and description of each field on the record;

(j) The identity and description of all codes associated with each field (e.g. termination codes, department codes, etc.) described in the answer to subparagraph (9);

(k) The name and description of each report which is regularly generated by the system, and the name, title and employer of person(s) having custody of each. Provide a sample of one or more pages of each of the reports.

30. Provide the following information, separately, for each computer file:

(a) The intervals at which copies are generated or the file preserved (e.g., yearly, quarterly, monthly, etc.);

(b) The date on which copies began to be kept or files preserved;

(c) The date of each copy or preserved file.

31. List the name of each generalized information retrieval program and/or report generator (e.g., Mark IV, Score,

etc.) including, but not limited to, commercially available programs/packages, and the name of the company which developed such program.

32. State whether any of the data requested in Questions 7, 13, 21, 22, 23, 24, 25, 26, and 27 is available in machine-readable form. If so, indicate which items in each question are available, and for what time period.

33. State with respect to the person(s) answering item 29-32 name, employer, business address, occupation and job title, and length of time in current position.

You are also invited to provide us with a statement of position or other evidence concerning the allegations made in the charge.

Please be informed that Commission regulations, 29 CFR Section 1602.14, require that all records relevant to this charge be preserved until final disposition of the charge, as defined in Section 1602.14.

Please be informed also that 18 USC Section 1001 provides felony criminal penalties for false, fictitious or fraudulent statements or representations, or concealment or cover up of material facts, or making or using false writing document, in any matter within the jurisdiction of any agency of the United States.

EXHIBIT G—CORRESPONDENCE

November 30, 1979

Shell Oil Company
P. O. Box 262
Wood River, Illinois 62095

Attn: Roger Rice
Administrative Superintendent

Re: Charge No. 072800036
Commissioner Norton

v.

Shell Oil Co.

Dear Mr. Rice:

This will confirm our agreement at Wednesday's conference, to meet again on January 15, to discuss the most feasible means for you to respond to certain areas of the First Data Request.

Production of certain data and compilations enumerated in the First Data Request could be burdensome if not retrievable by computer. To determine the least burdensome means of producing the required data, it is imperative, therefore, that you respond substantively to questions 29 through 33 in the Data Request. Alternate responses to the other questions of the Data Request will be dependent on the information available.

Preparation for our meeting in January will be facilitated if you will provide, in advance, responses to questions 1–5 and 9-11.

If you have any questions regarding this matter, please contact me at 314/425-4875. Thank you for your cooperation.

Very truly yours,

TERENCE W. MARLOW
Equal Opportunity Specialist
(Employment)

SHELL OIL COMPANY

P.O. Box 262
Wood River, Illinois 62095
January 17, 1980

Subject: Charge No. 072800036
Commissioner Norton
v.
Shell Oil Company

Mr. Terence W. Marlow
Equal Opportunity Specialist
Equal Employment Opportunity Commission
1601 Olive Street
St. Louis, Missouri 63103

Dear. Mr. Marlow:

Further to our recent telephone discussions, as you know, the oil industry is currently involved in a nation-wide labor dispute which involves work stoppages in almost all refining locations. As I indicated to you, at our Wood River Refinery we are involved in continuing negotiations toward a settlement. These negotiations have, unfortunately, prevented me from being able to meet with you on January 15 as originally planned. As soon as our situation clarifies, I will be in touch with you so that we can arrange a mutually convenient date to discuss the Commissioner's charge pending against Shell Oil Company's Wood River Refinery.

Please feel free to give me a call should you have any questions.

Very truly yours,

/s/ _____
R.B. RICE
Administrative Superintendent

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1601 Olive Street
St., Louis, Missouri 63103

January 23, 1980

Shell Oil Company
ATTN: Roger Rice
Administrative Superintendent
P. O. Box 262
Wood River, Illinois 62095

Re: Charge No. 072800036
Commissioner Norton
v.
Shell Oil Company,
Wood River Refinery

Dear Mr. Rice:

With respect to the referenced charge, the attached data request was received by you on October 29, 1978. At our meeting of November 28, it was agreed that a substantive response to major items of that request would be supplied on or before January 15, 1980, and that full compliance would be expected within a reasonable time thereafter.

We are cognizant of the fact that your labor negotiations have been continuing for some months, and you are unable to foresee when the situation might change. The Commission, however, must proceed with its investigation in a timely manner, and, to date, we have received no substantive response to any of the items requested.

Accordingly, we direct your attention to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, under which this agency is empowered to subpoena evidence necessary to its investigations.

It is our hope we will receive the requested information, and that it will, therefore, be unnecessary for us to resort to the subpoena process. However, unless the information enumerated in the aforementioned attached data request is received by February 25, 1980, we will be compelled to proceed under Section 710.

If you have any questions regarding this matter, please call me at 314/425-4875.

Very truly yours,

/s/

TERRENCE W. MARLOW
Equal Opportunity Specialist
(Employment)

072800036 T. MARLOW

PS Form 3811, Jan. 1979

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
- ☐ Show to whom and date delivered ..... ¢
- ☒ Show to whom, date and address of delivery ..... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered ..... ¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery $

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
Shell Oil Co.
ATTN: Roger Rice, Admin. Supt.
P.O. Box 262
Wood River, IL 62095

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	4949488	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☒ Authorized agent

X Shell B B

4. DATE OF DELIVERY: 1-24-80

POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

072800036 T. MARLOW

1/23/80 072800036

☆GPO : 1979-300-499

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, and 3 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

RETURN TO

(Name of Sender)
U.S. EQUAL OPPORTUNITY COMMISSION
ST. LOUIS DISTRICT OFFICE
(Street or P.O. Box) 1 RCE1
ST. LOUIS, MISSOURI 63103
(City, State, and ZIP Code)

P03 4349488

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO Shell Oil Co.
ATTN: Roger Rice, Admin Supt
STREET AND NO. P.O. Box 262
P.O. STATE AND ZIP CODE Wood River, IL 62095

POSTAGE	$
CERTIFIED FEE	¢
SPECIAL DELIVERY	¢
RESTRICTED DELIVERY	¢
RETURN RECEIPT SERVICE	¢
	¢
	¢
TOTAL POSTAGE AND FEES	$

CONSULT POSTMASTER FOR FEES
OPTIONAL SERVICES

POSTMARK OR DATE
072800036 T. MARLOW
subpoena threat. 1st data request encl again
1/23/80 sf

PS Form 3800, Apr. 1976

SHELL OIL COMPANY
P. O. Box 262
Wood River, Illinois 62095

March 7, 1980

Subject: Charge No. 072800036
Shell Oil Company
Wood River Refinery

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. Ed Mansfield
District Director
Equal Employment Opportunity Commission
1601 Olive Street
St. Louis, Missouri 63103

Dear Mr. Mansfield:

This is in response to your letter of October 26, 1979, and our several conversations with your staff concerning your request for a substantive response to the above-mentioned charge against Shell's Wood River Refinery. We must again state our concern over this charge as we do not believe that conditions at the Wood River Refinery justify a Commissioner's Charge. Indeed, in our meeting with representatives from your systemic unit, they were unable to provide any specific information whatsoever about the basis for this charge.

Over the past decade, Wood River Refinery has reduced its work force by more than 500 employees, approximately 23%, while increasing female and black representation significantly (Attachment I). Bottom line results reflect that the Refinery is in fact in a favorable position in reference to availability in the appropriate labor market (Attachment II). Of importance in this respect is the fact there have been no race or sex discrimination charges filed against our facility in the last six years. Only two such charges have been filed in the last decade and both of those charges were dismissed. This record was achieved with a reduction of the work force and a multitude of employee transactions over

the same period. Our record of equal opportunity is clearly not the profile anticipated for a Commissioner's Charge.

To asist in your understanding of the Wood River Refinery and its organizational structure, we have attached the following:

Brochure (Attachment III)
Organization Chart (Attachment IV)
Recent Contracts (Attachments V, VI, VII, VIII, IX)

A possible misunderstanding of the Wood River Refinery's equal opportunity posture could come from utilizing the wrong labor market area when comparing the work force utilization of blacks and females to that of the appropriate labor area. The federal government has already recognized and agreed that the appropriate local labor market for the Refinery is the multi-county area depicted on the attached map (Attachment X)—not the "bottom line" weighted representation or availability for individuals with appropriate skills in the labor force in those counties compared to the Refinery's December 31, 1979, summary work force statistics (Attachment XI). This procedure, which has not only been approved previously by the government but has also been endorsed in various court rulings, is based on a study of applicants' residence counties. Again the statistics reflect that Shell's Wood River Refinery is free of systemic discrimination against blacks and females.

Included on Attachment XI is a summary showing utilization of blacks and females in the work force who have been employed since July 1965. These should also be compared to the weighted representation or availability figures for individuals with appropriate skills. The work force representation for blacks on 12.3% and females of 9.8% compared to representation in the labor market reflect the nondiscriminatory effect of the Refinery's selection procedures.

As to the broad general allegations stated in the charge, the following will demonstrate that they are not consistent with the facts.

Hiring rates for females and blacks in 1979 exceeded the availability rates in the appropriate labor markets—blacks 14.8% compared to 4.7% and females 16.0% compared to

8.0% (Attachment XII). The combined 1977, 1978, and 1979 employment rates reflect the same positive results—11.1% blacks and 10.9% females (Attachment XIII). These general figures show that the total scope of hiring at Wood River has been clear of adverse impact against blacks and females.

Complete records of training are not available. Additionally, training records could not accurately capture the amount and nature of on-the-job training. However, promotion is generally a result of adequate training. In 1979 blacks and females participated in 11.1% and 10.2%, respectively, of the total Refinery promotions (Attachment XIV). Also in the combined years of 1977, 1978, and 1979 again there was the same positive result of 12.4% black and 10.6% female participation (Attachment XV). These rates are in excess of the black and female representation in the internal work force.

Terminations of blacks and females in 1979 were 2.1% and 3.2%, respectively. These rates are well below their representation in our work force as are the combined statistics for 1977, 1978, and 1979, which reflect that black terminations were but 2.6% of the total and female terminations 5.1% (Attachment XVI). These figures also show there was no adverse impact on blacks and females.

The promotions and hires combined for 1979 included black participation of 12% and females 11.7%. Over the period 1977, 1978, and 1979, blacks had a participation rate of 12.0% and females 10.7% (Attachment XVII). These positive figures compared to the low termination figures reflect the affirmative direction in which the Wood River Refinery is moving.

The foregoing amply demonstrates that upon reviewing the relevant facts, prohibitive discrimination has not been practiced at Shell Oil Company's Wood River Refinery and the charge that has been issued is not supportable by the facts.

As discussed in the November 28, 1980, meeting in the St. Louis office, we are again requesting that our following questions be answered and information be furnished.

—Why was a charge filed against the Wood River Refinery in light of our favorable profile and record?

—What is the basis for the charge?

—What information other than EEO-1 data was available and utilized in deciding to bring the charge?

—What pertinent information which the EEOC might have would clarify or give meaning to why we have been charged?

—Are there specifics to this charge? If so, what are they?

—Could we have a copy of EEOC Form 155, the *Preinvestigative Charge Analysis Form*, or the information contained on that form?

—Could we have the portion of the *Employment Analysis Report Profile (EARP)* pertaining to the Shell Oil Company Wood River Refinery or the information contained therein?

—It was agreed that the EEOC would give us the names of SMSA categories (industry and job codes) with which we were compared and the date of the data.

—It is our understanding that a charge shall be filed within 180 days after an alleged unlawful employment practice occurred and a notice of the charge including the date, place, and circumstances of the alleged unlawful employment practice shall be served upon the person against whom the charge is made. Can we assume that this 180-day limitation puts some bounds on this charge? If so, what dates are involved?

Thus after examining the general charge against Shell (Attachment XVIII), it is clear that we need and are entitled to more information about the charge than we have received should the Commission determine it is necessary to proceed.

In conclusion, please understand that we are most distressed by having this charge filed against us. It raises questions of fundamental fairness to be accused of violating

the law without being given any more specifics concerning the allegation than have been provided in this matter. As you are aware, the Commission requires individuals who claim there has been discrimination against them to provide a statement of each specific harm that the person has suffered and the date on which each harm occurred, along with a statement specifying the act, policy, or practice for each alleged harm that is unlawful and a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy, or practice is discriminatory. Information of this nature is needed to understand this charge.

To summarize the information submitted the facts reflect that, contrary to the charge, Shell's employee selection procedures have had no adverse effect against either blacks or females. In fact, there have been positive affirmative results from these procedures. We can also assure you that, as the results indicate, Shell bases employment decisions on valid, job-related criteria. Shell's bottom line statistics reflect that there is no violation of the Civil Rights Act of 1964 as amended on a systemic basis. Should there be an individual charge that we should be aware of, we would readily be prepared to investigate such a charge and evaluate the merits. Should no individual charge exist, the facts reflect that this Commissioner's Charge should be withdrawn.

Very truly yours,

/s/

R. B. RICE
Administrative Superintendent

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1601 Olive Street
St. Louis, Missouri 63103

March 21, 1980

R. B. Rice
Administrative Superintendent
Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

Re: *Norton v. Shell Oil co.—Wood River Refinery*
#072800036

Dear Mr. Rice:

I am in receipt of your letter of March 7, 1980 and take note of your position regarding your achievements in the area of equal employment opportunity for blacks and women.

As to your concerns about the propriety of, rationale for, and analysis supporting the issuance of this Commissioner charge, I believe my staff informed you that to answer questions which probe the agency's decision making processes violates agency privilege. As was done in your first meeting with my staff, I refer you to the published standards for the selection of systemic respondents contained in Section 16.2 of the EEOC Compliance Manual, and to the published authority for the issuance of Commissioner charges, contained in the Commission's Procedural Regulations, 29 C.F.R. Section 1601.11. As was also explained to you in your first meeting with my staff, EEOC form 155 is an internal processing document not subject to disclosure.

As to your question about the 180 day limitation, I would reiterate my staff's response that the investigation of a charge may properly include data from time periods beyond the six months preceding issuance of a charge. To the extent that you wish to raise the six month limitation as a defense to providing certain information, you may certainly

do so. I am confident my staff will respond to your concerns as they arise.

At this stage, however, we have received little or no evidence responsive to our requests. Consequently, we are unable to evaluate your defenses as to proper labor market availability for instance, because those defenses are prematurely raised. The charge herein has been properly issued. Your assurances to the contrary notwithstanding, we are still obligated to conduct an investigation of the merits of the charge.

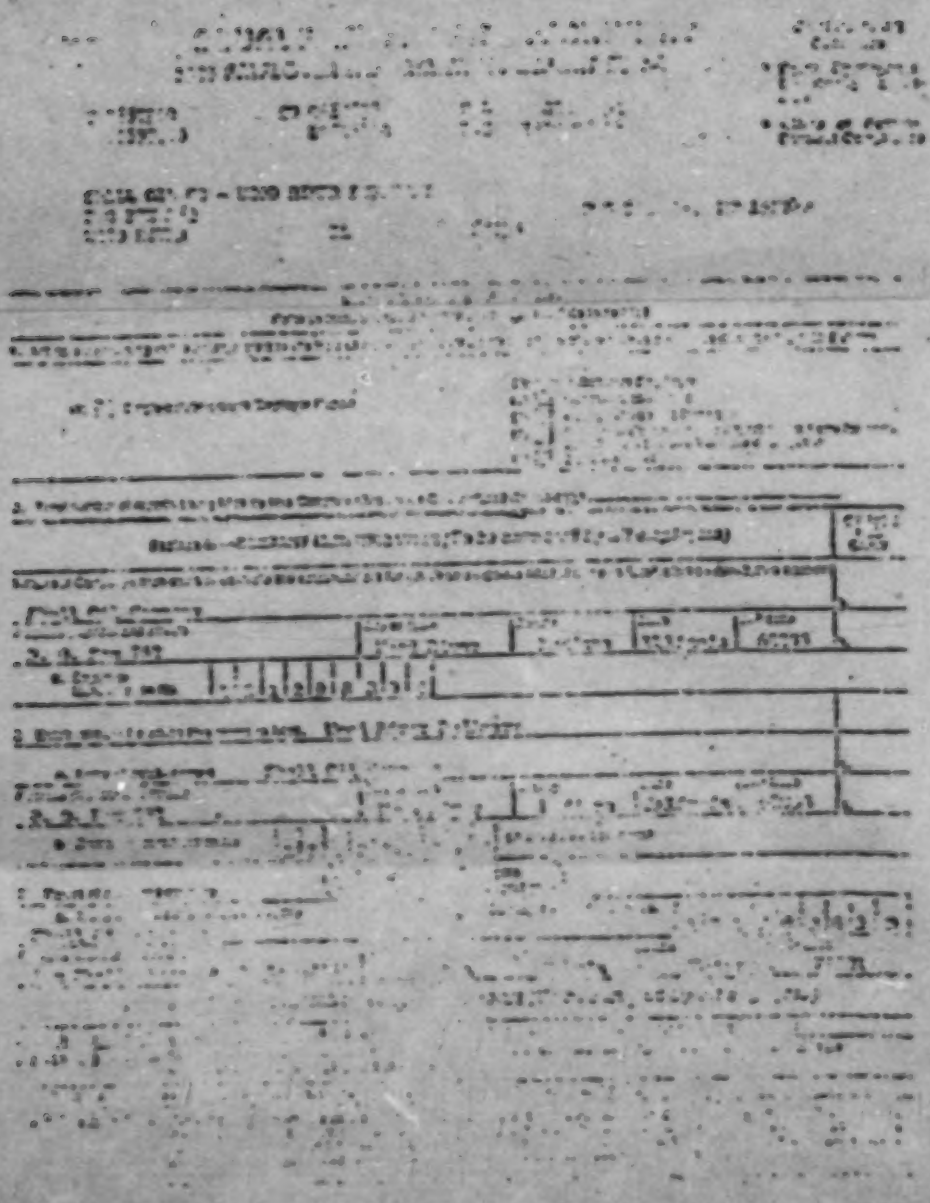
Further correspondence from my staff concerning the information requested last October, 1979, but not received, will follow.

Copies of EEO-1 and EARP data are enclosed.

Sincerely.

/s/

W. ED MANSFIELD
District Director



Best Copy Available

Job Categories	All employees in establishment			Male				Female			
	Total employees (Col. 2 + 3) (1)	Total male (including Hispanic) (2)	Total female (including Hispanic) (3)	Negro (4)	Oriental (5)	American Indian (6)	Spanish surnamed American (7)	Negro (8)	Oriental (9)	American Indian (10)	Spanish surnamed American (11)
Officials and managers	253	253	-	-	1	-	2	-	-	-	
Professionals	192	188	4	5	2	-	1	-	-	-	
Technicians	148	147	1	4	1	-	-	-	-	-	
Sales workers	-	-	-	-	-	-	-	-	-	-	
Office and clerical	112	37	75	1	-	-	-	4	-	-	
Craftsmen (Skilled)	840	840	-	9	-	-	1	-	-	-	
Operatives (Semi-skilled)	371	371	-	20	-	-	2	-	-	-	
Laborers (Unskilled)	77	77	-	11	-	-	-	-	-	-	
Service workers	29	29	-	-	-	-	-	-	-	-	
TOTAL →	2,022	1,942	80	50	4	-	6	4	-	-	
Total employment reported in previous EEO-1 report	2,100	2,019	81	47	1	-	6	3	-	-	

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Apprentices	Enter date of program	-	-	-	-	-	-	-	-	-	-	-
	Employees	13	13	-	-	-	-	-	-	-	-	-

* Alaska Native Eskimos and Aleuts with American Indians

NOTE: On consolidated report, skip questions 2-6 and Section E.
Was race or ethnic group information as to race or ethnic group in Section D obtained?
1 ☒ Visual Survey
2 ☐ Employment Record
3 ☐ Other—Specify: _____
Date of payroll period used—
12-31-72

4. Pay period of last report submitted for this establishment
12-31-71

5. Does this establishment employ apprentices?
This year? 1 ☒ Yes 2 ☐ No
Last year? 1 ☒ Yes 2 ☐ No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
1 ☒ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on consolidated basis

2. Is the major business activity at this establishment the same as that reported last year?
1 ☒ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, life insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Petroleum Refining

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

1 ☐ All data in this report are prepared in accordance with the instructions (with an consolidated entry)
2 ☐ This report is accurate and complete to the best of my knowledge

Name of person completing form: W. A. Wallace
Title: Refinery Manager
Signature: E. M. Walker
Date: January 26, 197

EMPLOYER INFORMATION REPORT EEO-1

ATTACH

1972 5064620 6 5-4 SIC-2911 Contract Compl

CO=0867878 U=0867900 EI=131299890 4

SHELL OIL CO-WOOD RIVER REFINERY OH691

PO BOX 262
WOOD RIVER IL 62095 0 9067777

Section A - TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☐ Headquarters Unit Report
(4) ☒ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only)

Section B - COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (if same as label, skip to item 2, this section) a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed. Wood River Refinery

a. Name of establishment Shell Oil Company

Address (Number and street)	City or town	County	State	ZIP Code	d.
P. O. Box 262	Wood River	Madison	Illinois	62095	

b. Employer Identification No. (If same as label, skip)

(Multi-establishment Employers: Answer on Consolidated Report only)

3. Parent or affiliated company

a. Name of parent or affiliated company b. Employer Identification No

Address (Number and street)	City or town	County	State	ZIP code

Section C - EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☒ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☒ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section D; otherwise complete ENTIRE form.

☒ Yes ☐ No 3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract on any such under any prime Government contract, amounting to more than $10,000, or (b) serve as a depositary of Federal Government funds, or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes, or (d) hold a Federal Government bill of lading in any amount?

Job Categories — Appendix 1A for definitions	NUMBER OF EMPLOYEES IN ESTABLISHMENT: Total Employees (Including Minorities) (1)	Total Male (Including Minorities) (2)	Total Female (Including Minorities) (3)	MALE: Negro (4)	Oriental (5)	American Indian (6)	Spanish Surnamed American (7)	FEMALE: Negro (8)	Oriental (9)	American Indian (10)	Spanish Surnamed American (11)
Officials and managers	254	254	-	-	1	-	2	-	-	-	-
Professionals	191	187	4	5	2	-	1	-	-	-	-
Technicians	147	147	-	4	1	-	-	-	-	-	-
Sales workers	-	-	-	-	-	-	-	-	-	-	-
Office and clerical	112	36	76	1	-	-	-	4	-	-	-
Craftsmen (Skilled)	854	854	-	9	-	-	1	-	-	-	-
Operatives (Semi-skilled)	380	380	-	20	-	-	2	-	-	-	-
Laborers (Unskilled)	69	69	-	8	-	-	-	-	-	-	-
Service workers	31	31	-	2	-	-	-	-	-	-	-
TOTAL →	2,038	1,958	80	49	4	-	6	4	-	-	-
Total employment reported in previous EEO-1 report	2,100	2,019	81	47	1	-	6	3	-	-	-

(The boxes below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Apprentices (Enter-ed above)	Negro	-	-	-	-	-	-	-	-	-	-	-
	Oriental	-	-	-	-	-	-	-	-	-	-	-
	American Indian	-	-	-	-	-	-	-	-	-	-	-
	Spanish Surnamed American	-	-	-	-	-	-	-	-	-	-	-
	Other*	13	13	-	-	-	-	-	-	-	-	-

*Other includes Eskimos and Aleuts with American Indians

1. NOTE: On consolidated report, skip questions 2-6 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 ☒ Visual Survey
   2 ☐ Employment Record
   3 ☐ Other—Specify _____
3. Dates of payroll period used—
   11-30-72
4. Pay period of last report submitted for this establishment
   12-31-71
5. Does this establishment employ apprentices?
   This year? 1 ☒ Yes 2 ☐ No
   Last year? 1 ☒ Yes 2 ☐ No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No ☐ 3 ☐ Did not report last year 4 ☐ Reported on combined basis
2. Is the major business activity at this establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale electrical supplies, life insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Petroleum Refining

a.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one
1. ☐ All reports are accurate and were prepared in accordance with the instructions (Check on consolidated only)
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
P. E. Block	P. O. Box 262				
Date	City and State	ZIP code	Telephone Area Code	Number	Extension
			618	254-7371	495

(December 31, 1971)

SIC=291

CO=0867878 U=0867900 EI=131299690 S=4

SHELL OIL CO-WOOD RIVER REFINERY
PO BOX 262
WOOD RIVER IL 62095

3 OF 125

4-9041866

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☐ Headquarters Unit Report
(4) ☒ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

Parent Company which owns or controls the establishment for which this report is filed (If same as label, skip to Item 2, this section)

a. _____

Address (Number and street) | City or town | County | State | ZIP code

b. _____

b. Employer Identification No.

c.

2. Establishment for which this report is filed. Wood River Refinery

a. Name of establishment Shell Oil Company

Address (Number and street) P. O. Box 262 | City or town Wood River | County Madison | State Illinois | ZIP Code 62095

d.

b. Employer Identification No. _____ (If same as label, skip.)

3. Parent or affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company _____ b. Employer Identification No. _____

Address (Number and street) | City or town | County | State | ZIP code

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to 2 or 3, skip to Section D; otherwise complete the rest.

Yes ☐ No 3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or first-tier subcontract under any prime Government contract, exceeding in value $10,000; or (b) serve as a depository of Federal funds, or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) act as a financial agent of the Government in any capacity?

Establishment—Report all persons [illegible] 7, or part-time employees, including apprentices, on the pay [illegible] as set forth in the instructions. Enter appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros. Lines 1, 2, and 3, include ALL employees in the establishment including those in minority groups.

	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix B to Guidelines)							
				MALE				FEMALE			
	Total Employees including Minorities (1)	Total White (Not of Hispanic Origin) including Minorities (2)	Total Public Including Minorities (3)	Negro (4)	Oriental (5)	American Indian (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian (10)	Spanish Surnamed American (11)
[illegible]	266	266	-	-	-	-	2	-	-	-	-
[illegible]	202	198	4	5	1	-	1	-	-	-	-
[illegible]	146	146	-	3	-	-	-	-	-	-	-
[illegible]	-	-	-	-	-	-	-	-	-	-	-
Clerical	116	39	77	3	-	-	-	3	-	-	-
[illegible]	894	894	-	9	-	-	1	-	-	-	-
[illegible]	375	375	-	19	-	-	2	-	-	-	-
[illegible]	72	72	-	8	-	-	-	-	-	-	-
[illegible]	29	29	-	-	-	-	-	-	-	-	-
TOTAL→	2,100	2,019	81	47	1	-	6	3	-	-	-
Previous report (EEO-1 report)	2,113	2,033	80	48	1	-	6	3	-	-	-

(The trainees below should also be included in the figures for the appropriate occupational categories above)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
White collar	-	-	-	-	-	-	-	-	-	-	-
Production	18	18	-	-	-	-	-	-	-	-	-

a. Include Eskimos and Aleuts with American Indians

b. On consolidated report, skip questions 2-6 and Section E.

c. Is information as to race or ethnic group in Section D based on?
Visual Survey ☐ 3 ☐ Other—Specify _____
Employment Record
Name of payroll period used—
2-31-71

d. Pay period of last report submitted for this establishment
9-30-72

e. Does this establishment employ apprentices?
This year? 1 ☑ Yes 2 ☐ No
Last year? 1 ☒ Yes 2 ☐ No

Section E—ESTABLISHMENT INFORMATION

Is the location of the establishment the same as that reported last year?
1 ☐ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on combined basis

Is the major activity of this establishment the same as that reported last year?
1 ☒ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, life insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Petroleum Refining

a.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See Instructions G)

1. ☐ All reports are accurate and were prepared in accordance with the instructions. (Check on consolidated only)
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Authorized Official	Title	Signature	Date
A. Ballman	Refinery Manager	E. Ballman	February 28, 1972

Person to contact regarding this report (Type or print)	Address (Number and street)	City and State	ZIP code	Telephone Area Code	Number	Extension
R. Stark	P. O. Box 80					

[illegible] INFORMATION - UNAUTHORIZED DISCLOSURE PROHIBITED

1976 EEO-1 EMPLOYMENT ANALYSIS REPORT PROGRAM (EARP) PAGE 3,644

[illegible] WOOD RIVER REFIN PO BOX 262 — WOOD RIVER — IL MADISON — SHELL OIL COMPANY

[illegible] (7060) ST. LOUIS, MO-IL — HDQ (086787) STATUS (4) UNIT (086793) E.I.NUMBER (1?1299690) 052

	TOTAL (EMPLOYMENT)	WHITE COLLAR: TOTAL	OFFICIALS & MNGRS	PROFESSIONALS	TECHNICIANS	SALES WORKERS	OFFICE & CLER WKRS	BLUE COLLAR: TOTAL	CRAFT WORKERS	OPERATIVES	LABORERS	SERVICE WORKERS
T	1,731	522	241	102	83	0	96	1,187	763	348	76	22
[illegible]	1,665	491	241	96	82	0	32	1,172	763	335	74	22
[illegible]	66	31	0	6	1	0	64	15	0	13	2	0
[illegible]	88	17	1	6	3	0	7	70	11	44	13	1
[illegible]	79	11	1	6	3	0	1	67	11	42	14	1
[illegible]	9	6	0	0	0	0	6	3	0	2	1	0
[illegible]	5	1	1	0	0	0	0	4	2	2	0	0
[illegible]	5	1	1	0	0	0	0	4	2	2	0	0
[illegible]	0	0	0	0	0	0	0	0	0	0	0	0
[illegible]	1	1	0	1	0	0	0	0	0	0	0	0
[illegible]	1	1	0	1	0	0	0	0	0	0	0	0
[illegible]	0	0	0	0	0	0	0	0	0	0	0	0
[illegible]	0	0	0	0	0	0	0	0	0	0	0	0
[illegible]	0	0	0	0	0	0	0	0	0	0	0	0
[illegible]	0	0	0	0	0	0	0	0	0	0	0	0

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1601 Olive Street
St. Louis, Missouri 63103

April 11, 1980

Shell Oil Company
R.B. Rice, Administrative Superintendent
P.O. Box 262
Wood River, IL 62095

Dear Mr. Rice:

This letter is in further response to your letter of March 7, 1980, and Attachments thereto. First, we wish to acknowledge our receipt of the following submissions:

1. Table showing total work force comparison, 1969-1979 (Attachment I);
2. Table comparing total work force with Labor Market Data, 1979 (Attachment II);
3. Brochure describing Wood River Refinery (Attachment III);
4. Organization charts dated January 1, 1979 (Attachment IV);
5. Collective Bargaining Agreements dated January 8, 1979, between Shell Oil Company and Boilermakers Local Lodge 485 (Attachment V);
6. Collective Bargaining Agreements dated January 8, 1979, between Shell Oil Company and IAMAW (Attachment VI);
7. Collective Bargaining Agreements dated January 8, 1979, between Shell Oil Company and IUOE Local 525 (Attachment VII);
8. Collective Bargaining Agreements dated January 8, 1979, between Shell Oil Company and PPF Local 555 (Attachment VIII);
9. Collective Bargaining Agreements dated January 8, 1979, between Shell Oil Company and Seven Unions

(Locals 525, 649, 56, 917, 268, Carpenters Dist. Council and LIUNA) (Attachment IX)

10. Map outlining Labor Market Data (Attachment X)

11. List of counties with Labor Market Data (Attachment XI);

12. Summary Hiring Data 1979 (Attachment XII);

13. Summary Hiring Data 1978-1979 (Attachment XIII);

14. Summary Production Data 1979 (Attachment XIV);

15. Summary Production Data 1977-1979 (Attachment XV);

16. Summary Termination Data 1979 and 1977-1979 (Attachment XVI);

17. Summary Promotion/Hiring Data combined 1979, combined 1977-1979, total Workforce Data December 31, 1979 (Attachment XVII);

18. Copy—EEOC Form 131 and Charge of Discrimination by Commissioner Norton, 072800036 (Attachment XVIII).

Insofar as any of this documentation is or will be helpful towards resolution of the issues alleged in this charge, its submission is appreciated. However, as will be detailed below, this submission falls far short of the quantum of information necessary to accurately determine the validity of the allegations made in this charge.

Attached is an additional copy of the first Data Request made of your organization on October 26, 1979, more than five (5) months ago. As has been repeatedly pointed out, the District Office is not in a position to argue over the propriety of the issuance of the charge. It is and will continue to be the responsibility of this office to investigate the charge as it currently exists. In that respect, we are still in need of all the items contained in the first Data Request, as modified below:

Items #1 through #6—no modifications;

Item #5—partially satisfied by your March 7, 1980 submission, names are still necessary;

Item #6—submission of the Collective Bargaining Agreements described above partially satisfies this item request, additional and earlier contracts are, however, still required to be produced;

Items #7 through #12—no modifications were agreed upon;

Item #13—modified to delete reporting as to ethnic status, modified to change the word minority to Black, modified reporting period to October 1, 1977 through September 30, 1979;

Items #14 through #19—no modifications were agreed upon;

Item #19—interpreted to exclude professional organizations, trade organizations and the like, but to include private/social slubs for which Shell Oil Company purchases membership;

Item #20—modified as to time period (new dates are April 1, 1977 through March 31, 1979;

Items #21 and #22—time period modified to October 1, 1977 through September 30, 1979, with reservation of EEOC right to expand period, if necessary;

Items #21 and #23—to the extent that Respondent raised concerns about the burden of compiling this information and the Commission's District Office personnel were and remain willing to accept information in whatever form maintained which substantially responds to these requests;

Item #22—no other modifications, except as described above;

Item #24—no modifications agreed upon, however, the submission of information in the format in which it is maintained for review by OFCCP will be accepted in lieu of the format requested, provided the information is substantially the same;

Item #25—modified to delete reporting on SSA's and other minorities, except Blacks; other modifications proposed but not agreed to pending receipt of summary data as to names

of participants by EEO category and names of courses offered;

Items #26 and #27—modified to the extent that Commission's personnel agreed to accept summary data by EEO-1 job category, showing percentage of terminations of Blacks, Whites, males and females within each category;

Item #28—no modification

Items #29 through #33—no modifications proposed or agreed upon.

Your submission of Attachments I, II, XII, XIII, XIV, XV, XVI and XVII are insufficient insofar as they contain only facility totals of the activity reported on, rather than information that can be used to analyze activities by particular and meaningful categories. Your submission of Attachments II, X, XI, XII and XIII are insufficient to make any legitimate determination of the Labor Market availability.

Our records show that you were served with this charge and the first request for information on October 26, 1979. At that time, you were advised that we wished to meet and establish a production date. Your request that the meeting be postponed from November 8, 1979 to November 28, 1979 was honored by the Commission. At our November 28, 1979 meeting, while the Commission wished to schedule a much earlier meeting to finalize the most expeditious means of getting production, we acquiesced in your request for a January 15, 1980 date. You were unable to meet on January 15, 1980, and the Commission, upon receipt of your notice that you could not give us a definite date to meet to further discuss compliance with the Commission's request, issued you a notice that we could proceed under Section 710 of Title VII to Subpoena information, unless substantive responses to major items were produced on or before February 25, 1980. On February 21, 1980, you submitted only the information outlined above, not the information requested and discussed at our November 28, 1979 meeting.

To date, then, while the Commission has made numerous concessions and modifications in order to accomodate your concerns, we have received little or no substantive informa-

tion to move this investigation forward. We are now giving final notice that full compliance with our first Data Request is expected to be produced on or before April 25, 1980. Without such compliance in full by this date, this District Office will be forced to issue a Subpoena duces tecum for the information requested. No further extensions will be granted.

As has been the case from the outset of this proceeding, the Commission remains willing to accept access to the requested information, provided, of course, that a mutually agreeable date for review and reproduction at your facility is agreed upon prior to the date specified herein for production. As has also been the case since the outset, the Commission remains willing to discuss the substitution of preexisting reports for some of the information requested, provided such a discussion can be accomplished prior to the production.

Subsequent Data Requests are normally made after analysis of data from your response to the first Data Request; however, when any of the relevant evidence identified by the first Data Request is available but not provided, the Commission will issue a Subpoena seeking all the evidence reasonably related to the investigation, as identified by Attachment B. Compliance with the first Data Request (Attachment A) and any subsequent Data Requests, will likely facilitate the investigation by allowing for subsequent submission of specific evidence after our analysis of the preliminary evidence. If items identified in the first Data Request, as modified, are provided by April 25, 1980, the evidence in the second Attachment (Attachment B) but not in the first Data Request, need not be provided unless specifically requested by the Commission in a later Data Request.

Your future cooperation is appreciated.

Sincerely,

/s/

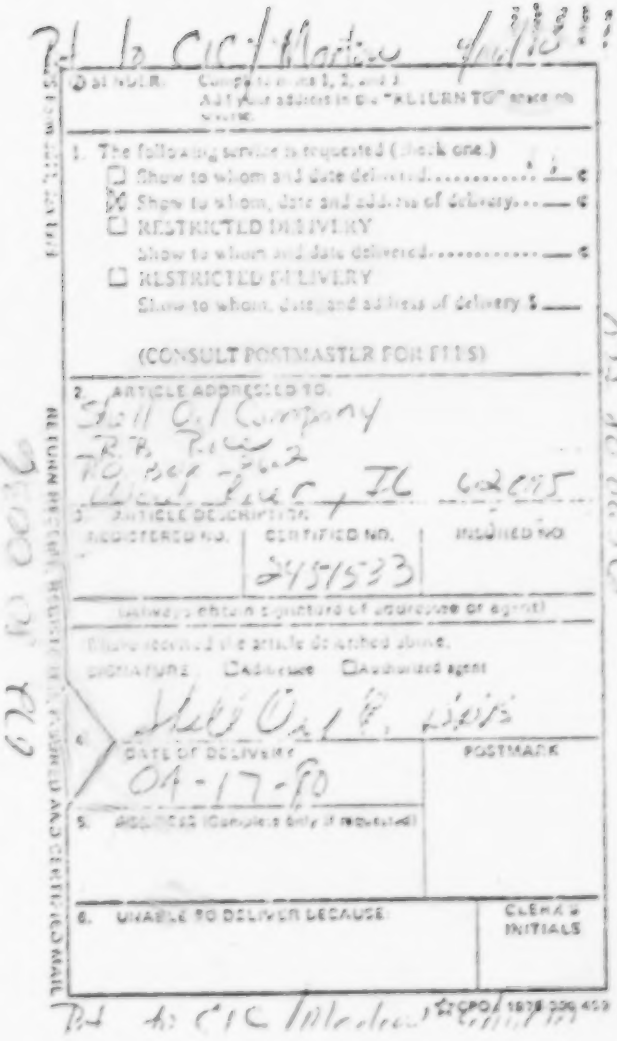
EARNESTINE C. THOMAS

Supervisory Equal Opportunity Specialist

Enclosures: (2)

Attachment A

Attachment B



Pd to CIC/Marion 4/18/90

RETURN RECEIPT REQUESTED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
- ☐ Show to whom and date delivered..... ¢
- ☒ Show to whom, date and address of delivery.... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered..... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom, date and address of delivery $

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
Shell Oil Company
R.P. Price
P.O. Box 4602
Houston, TX 77210

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 245153 | INSURED NO.

(always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. Shell Oil Co. Davis
DATE OF DELIVERY 04-17-90
POSTMARK

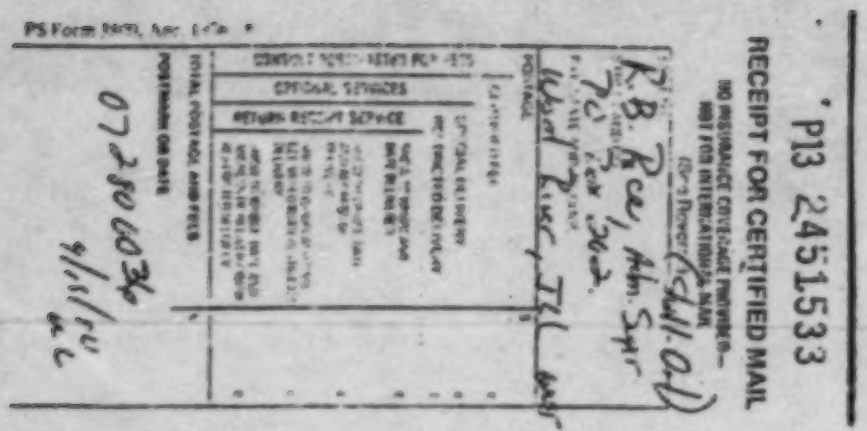
5. ADDRESS (Complete only if requested)

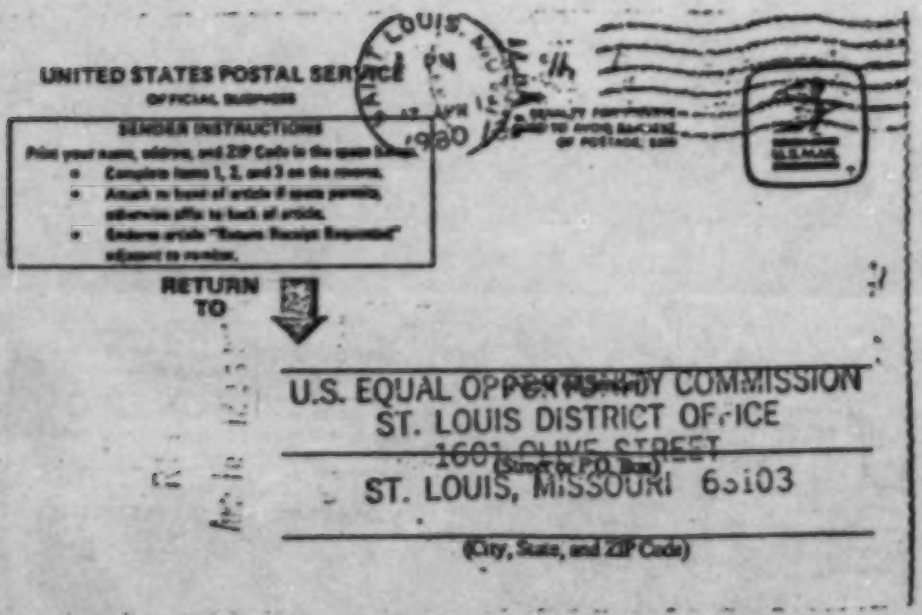
6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

Pd to CIC/Marion

PS Form 3811, Dec. 1978 [illegible]

Pd to CIC 4/18/90


P13 2451533
RECEIPT FOR CERTIFIED MAIL
OFFICIAL SERVICE
RETURN RECEIPT SERVICE
K.B. Rice, Adm. Supr.
Postage
07280 0036
9/11/80


UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS
SENDER INSTRUCTIONS
RETURN TO
U.S. EQUAL OPPORTUNITY COMMISSION
ST. LOUIS DISTRICT OFFICE
1601 OLIVE STREET
(Street or P.O. Box)
ST. LOUIS, MISSOURI 63103
(City, State, and ZIP Code)

SHELL OIL COMPANY
P.O. Box 262
Wood River, Illinois 62095

April 28, 1980

Subject: Charge No. 072800036
Shell Oil Company
Wood River Refinery

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Earnestine C. Thomas
Supervisory Equal Opportunity Specialist
Equal Employment Opportunity Commission
1601 Olive Street
St. Louis, Missouri 63103

Dear Ms. Thomas:

This is in response to your April 11, 1980, letter which was received at the Shell Wood River Refinery via certified mail on April 17, 1980.

Your letter requires clarification in several respects. Although the chronology of meetings and correspondence on page 4 is generally accurate, the narrative fails to record the understandings that were reached. The ongoing discussions of due dates left neither of the parties in doubt about the reasons for delays, and the EEOC representatives indicated that they were in complete understanding and agreement with the necessities of such delays.

We appreciate your attempts to make"concessions and modifications in order to accommodate". The fact remains, however, that those modifications were made by the Commission to correct its questionnaire in an attempt to put it in accord with the scope of the general charges and to correct a number of inconsistencies therein as to the time periods covered by various items. Your letter also fails to acknowledge the substantial burden of collection and compilation required to meet the Commission's demands for information. Moreover, we question the appropriateness of your utilizing a standardized form questionnaire without

approval of the Office of Management and Budget (OMB) as required by the Federal Reports Act.

Additionally, the Employment Analysis Report Profile (EARP) which was forwarded to us with the Commission's March 21, 1980, letter appears to contain employment figures for year-end 1975; therefore, we continue to question whether the EEOC relied on data outside the applicable statutory time limits in issuing this Commissioner's charge.

Shell's questions have not been adequately addressed even though Shell has submitted data indicating that this Commissioner's charge is unfounded and should be dismissed. In light of the above and previously stated concerns, and your statement that "... the District Office is not in a position to argue over the propriety of the issuance of the charge", this matter and our concerns should be passed on to the appropriate parties in the Commission who are in a position to discuss and deal with the propriety of the issuance of the subject charge.

We remain prepared to discuss this matter further if necessary.

Very truly yours,

/s/ _____

R. B. RICE

Administrative Superintendent

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SUBPOENA

NO. [illegible]

TO: Regan Rice, Administrative Superintendent
(Name)
P.O. Box 310, Wood River, Illinois 62095
(Address)

IN THE MATTER OF Eleanor Holmes Norton

v. Shell Oil Company

Charge No. 07281[illegible]

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ *Testify before:*

☐ *Produce and bring the documents described below:*

☐ *Provide access to the evidence described below for the purpose of examination or copying to:*

[illegible] of the Equal Employment Opportunity Commission

at [illegible] on [illegible] at [illegible] o'clock of that day.

The evidence required is: [illegible]

"D, consisting of three sheets, beginning with the heading [illegible] ment A.

If the addressee intends not to comply with this subpoena, see the applicable portion of Section 1601.16 of the Commission's Procedural Regulations (reprinted on reverse) for guidance.

ISSUING OFFICIAL (Typed name, title and address)	ON BEHALF OF THE COMMISSION (Signature)
[illegible] District Director 210 N. Tucker Blvd. St. Louis, MO 631[illegible]	DATE: [illegible]

EEOC FORM AUG 76 136 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE AND SHOULD NOT BE USED

CHARGE FILE COPY

Exhibit H

EXHIBIT H—SUBPOENA

ATTACHMENT A

Attachment to Subpoena No. 80-35 in Charge No. 072800036 dated September 27, 1979

Each numbered item shall apply to all departments, employees, and positions within or controlled by Shell Oil Company's facilities located at Wood River, Illinois and all predecessor facilities, departments, employees, and positions performing similar functions at any time since 1965, unless otherwise indicated.

Each item is to be answered separately for each year from January 1, 1976, to the present, unless otherwise indicated. For each numbered item requesting "Lists or Documents", lists, compilations or summaries, must be provided to the extent that such compilations or summaries are maintained or can be produced through computer or other mechanical sources available to the Respondent to produce such materials. Documents must otherwise be provided. Please identify each document or response by using the number of the item to which it responds, and present documents or responses in numerical order.

Unless a contrary meaning appears, the following definitions apply:

a. "*Employee*" refers to any person, including all officers, executives, managers, supervisors, and professionals who are or have been employed by the Company on a full or part time basis and on a temporary or permanent basis;

b. "*Job Title*" and "*job*" refer to the descriptive names given by the Company to the positions held by its employees;

c. "*Job Group*' refers to the Company's classification of employees for purposes of utilization workforce analysis in its Affirmative Action Program;

d. "*Candidate*" refers to applicants and any person seeking or considered for permanent, full-time, or temporary employment at the Company and includes, but is not limited to, walk-in applicants,

write-in applicants, and all persons whose names are referred to or obtained by the Company from employment agencies or any other internal and external recruiting sources, whether such persons are inteviewed or not; "internal candidates" refer to any person who is on the Company payroll at any facility at the time she/he meets the definition of "candidate", and "external candidates" refer to all other persons who meet the definition of "candidate";

e. "*Hire*" refers to any hire or rehire for permanent, temporary, full-time or part-time employment; it does not include a recall, reinstatement or transfer from another facility:

f. "Promotion" refers to any permanent change from one job to another with a higher maximum rate of pay;

g. "*Documents*" refer to any and all writings, records, reports, memoranda, books, letters, coorespondence, notes, manuals, summaries, compilations, studies, papers, circulars, directives, applications, lists, surveys, agreements, contracts, postings, printouts, requisitions, plans, programs, cards, notices, position descriptions, files, ledgers, indexes, ratings, evaluations, tests, references, affirmative action plans, equal employment programs, and every other writing;

h. *Test*" refers to any paper and pencil or performance measure used as two (2) basis for any employment decision including, but not limited to, any measure of general intelligence, knowledge, specific intellectual abilities, physical abilities, technical skills, mechanical, clerical, or other aptitudes, dexterity and coordination, knowledge and proficiency, occupational and other interest, attitudes and personality;

i. "*Department*" refers to any functional unit, division, branch, or section into which employees are grouped or organized by the Company;

j. "*Facility*" refers to the Company's business operations at one address;

k. "*EEO–1 Category*" refers to those job categories used on the EEO-1 Employer Information Report;

l. "*Race Identification*" refers to the following grouping as used as the EEO–1 Employer Information Report:
White (not of Hispanic Origin)
Black (not of Hispanic Origin)
Others

m. "*Discipline*" refers to and includes discharge, suspension, demotion, forced transfer, forced resignation, oral warnings, written warnings, and written reprimands.

The evidence required is all documents maintained by the Respondent, Shell Oil Company, or within its possession or control which constitute or relate to the following:

1. Lists or Documents showing for each official at the facility who has had over-all responsibility for recruitment, hiring, initial assignment, training, salaries, promotion, and/or termination at any time since 1976, the following information:

a. Name, sex, and race identification;

b. Title;

c. Business address;

d. Telephone number;

e. Description of area(s) or responsibility and scope of responsibility;

f. Time period during which such responsibility was exercised;

g. If no longer employed by the Company, the address and telephone number where the individual can be reached.

2. An organizational chart and/or Lists and/or Documents showing:

a. All sections, departments, divisions, or other organizational sub-groups in the facility, identifying the lines of authority;

b. The name, job title, sex and race identification of the individual in charge of each group or subgroup on the chart, or List or Documents;

c. Description of the function of each group or subgroup.

3. Lists or Documents showing the following information with respect to each labor organization, if any, which has represented employees at the facility at any time since 1976:

a. Name and address of the local union;

b. Name, business address, and telephone number of each business agent or similar representative;

c. Names of all regional, national, or international organizations with which the local union is affiliated;

d. All job titles in the bargaining unit represented by the union;

e. Copies of all collective bargaining agreements, together with any letters of understanding or other clarifying documents, in effect at any time since 1976, excluding those submitted under cover of Mr. R. B. Rice's March 7, 1980 letter;

f. Description of union participation in recruitment, promotion, upgrading, transfer, training, or layoff procedures, if not specified in the collective bargaining agreement.

4. Lists or Documents which show for each year as of April 1, 1977, April 1, 1978, and April 1, 1979, for each division and/or other sub-group identified in the materials responsive to Item 2, all job titles, including the following information for each job title:

a. EEO–1 category;

b. Job code;

c. Whether exempt or non-exempt;

d. Method of compensation (e.g., hourly, weekly, commission, etc.);

e. Wage rate or labor grade for hourly employees; salary grade or level and range if salaried job (if there is no established range for the job, provide the actual salary range of persons in the job);

f. Total number of *permanent* full-time employees, and a breakdown of that total by sex, and race identification;

g. Number of vacancies in the job since March 31, of the previous year;

h. Percentage of the vacancies specified in Item g that were filled by promotion.

(if lists are being provided, show for each unit the Official and Manager positions in order of authority. For the other EEO-1 categories, order the job titles by wage rate, or salary level.—See suggested format 1)

5. Lists or Documents showing the following information for all part-time and temporary personnel:

a. The total number of permanent part-time employees employed as of April 1, 1977, April 1, 1978, April 1, 1979, and separately for each of those dates the number employed by organizational subgroup, EEO-1 category and job title;

b. The total number of *temporary* employees employed as of April 1, 1977, April 1, 1978, April 1, 1979, and separately for each of these dates, the number employed by organizational sub-group, EEO–1 category and job title.

6. For each job title identified in response to Item 4, provide copies of all job descriptions, job standards, job analyses or other documents which indicate the duties, responsibilities, qualifications and components of the job.

7. Affirmative Action Plans, all supporting data for each year, 1976 to 1979, and all documents showing all affirmative action compliance program requirements, including all correspondence and agreements with or from any compliance agency.

8. Copies of the Wood River facility's EEO–1 Employer Information Report for each year since 1978, and Lists or Documents showing:

a. The job titles included in each EEO–1 category;

b. If some job titles have been reported in different EEO-1 job categories for different years, show those changes by category and year.

9. A copy of company documents, used at any time since 1977, as follows:

a. All forms used in the application, hiring, and assignment process, including but not limited to applications, applicant evaluation forms, testing forms, interview forms, job history forms, reference forms;

b. All other personnel related forms, including but not limited to those used in the transfer, promotion, selection for training, pay change, layoff, evaluation, discipline, or termination of employees;

c. All manuals of personnel procedures (such as employee handbooks, supervisor's manuals, manuals of personnel policies and procedures, and complaint or grievance policies);

d. All other documents which, at least in part, descrioe Company personnel policies and procedures;

e. Health, pension and retirement plans, leave requlations, and other fringe benefit plans, including those relating to maternity benefits;

f. Salary administration plans, including descriptions of salary groups, labor grades and salary ranges, all job analyses, job descriptions, job standards, and any other documents used to set salary or wage levels and rates for each job (unless provided in response to Item 6).

10. For each report regulary or specially prepared by or for the Company at anytime since 1977 concerning the facility's personnel related activities (including, e.g., reports relating to applicants, hiring, assignments, promotions, transfers, terminations, employee personnel histories, employee turnover, EEO activities, or projected future hiring or promotions) provide a copy of the report and Lists or Documents showing:

a. Name, description, and purpose of the report;

b. Whether the report is prepared manually or by using data processing capabilities;

c. The documents systems or other information sources used to prepare the report, and for each

such system or source, whether it contains information as to sex and/or race/identification;

d. The name and title of the person responsible for preparing the report.

11. *Copies of:*

a. All records, documents, and reports that have been maintained anytime since 1977 that include in list, summary, or compiled form information as to the sex and/or race/identification of applicants, candidates, or hires including but not limited to such records, interview records, initial assignment records, summary listings of applicants and/or hires, and any other records, documents, and reports;

b. All documents, records, and reports maintained at any time since 1977 which reflect in list, summary, or compilation form, information on:

1) Persons who sought promotion or transfer;

2) Persons selected for promotion or transfer;

3) Reasons for selection or non-selection of persons for promotion or transfer;

4) Persons identified by the company as "promotable";

5) Sex and/or race/identification of persons who sought and/or were selected for promotion or transfer.

12. A copy of any written criteria or standards used at any time since 1977 in connection with evaluating candidates for hire, assignment, transfer, promotion, or training which have not been supplied in response to Items 6 or 9.

13. Separately for each of the criteria listed below, provide Lists or Documents showing the facility's use of the criterion from 1977 to the present, including, but not limited to: (1) how the facilsity solicited the information and if obtained; (2) how the information, if obtained, has been used in making employment decisions; (3) the weight given the criterion; and (4) the jobs for which the criterion has been used:

a. Arrest records;

b. Conviction records;

c. Credit or financial checks;

d. Recommendations from previous employers;

e. Personal references;

f. Military record or veterans preference;

g. Previous salary or income;

h. Marital status;

i. Number and ages of children;

j. Friends and relatives in the company;

k. Height or weight;

l. Supervisory recommendations.

14. Provide a copy of each paper and pencil or formal performance measure (hereinafter "test") used at any time since 1976 in connection with any hiring, assignment, promotion, transfer, or training decision; for each such test, provide Lists or Documents with the following information:

a. Name, desacription of the test, and scoring procedures;

b. Name and title of the person(s) responsible for administering the test;

c. Time period during which the test has been used;

d. Purpose of the test, including the job titles for which the test has been used;

e. The specific manner in which test results are applied in making employment decisions for each job title, including any minimum score or rating.

15. Separately for each occasion each test identified in response to Item 14 above was given, provide Lists or Documents showing for all persons taking each test anytime since October 1, 1977, the following information:

a. Name;

b. Sex;

c. Race/identification;

d. Date on which the test was taken;

e. Score, rating, or other test result;

f. Final disposition or employment action taken as a result of the test.

16. Lists or Documents, including the following information for each test identified in response to Item 14 above:

a. A copy of each validation study including all relevant documents and attachments;

b. Name and address of person or organization conducting the study;

c. Date of each study;

d. Results of each study.

17. Lists or Documents showing the following information concerning recruitment sources listed below, applicable anytime during the period April 1, 1977, to date:

a. For newspaper or other media advertising utilized for seeking applicants for vacant positions, include the name and address of each newspaper or other media, the date(s) on which each was so used, and the job(s) to be filled on each date;

b. For high schools, technical schools, colleges and/or universities contacted for the purpose of encouraging applications or interviewing applicants, include the name of each institution, the dates of each such contact, the nature and extent of the contact, and the job(s) involved on each occasion;

c. For public or private employment agencies contacted for the purpose of recruiting applicants, include the name and address of each such employment agency, the dates of each such contact, the nature and extent of the contact, and the job(s) involved on each occasion;

d. For specialized organizations contacted, such as women's or minority groups, for the purpose of recruiting applicants, include the identity of the group, dates of the contact(s), and the job(s) involved on each occasion;

e. For incumbent employees utilized as a recruitment source for applicants, identify any bonus or incentive used to encourage employee referrals, and show for which jobs this source was used;

f. For other recruitment sources utilized in seeking applicants, identify the name and address of each source, the dates of each contact, the nature and extent of the contact, and the job(s) involved on each occasion.

18. For each recruitment source utilized as identified in the Lists or Documents provided in response to Item 17 above, provide Lists or Documents which show for each EEO–1 job category, the approximate percent of new hires during the period October 1, 1977, to the present, which have come for each source. (If Lists are being provided, see suggested format 2)

19. Lists or Documents setting forth the following information for each vacancy by EEO–1 categories (e.g., in EEO–1 categories official and manager, professional, technical, salesworker) filled anytime during the period October 1, 1977, to date:

a. Date position(s) became vacant, job title, job group, department, EEO-1 category, salary grade, and salary range;

b. Minimum qualifications required, including but not limited to education, experience, and test(s) results;

c. All recruitment, both internal and external, performed for each, specifying for each recruitment source and method the total number of candidates obtained by sex and race/identification;

d. Whether internal candidates considered;

e. Name, sex, race/identification, salary or wage, and date of selection for each person selected.

20. Lists or Documents setting forth the following information for each internal candidate considered, including those selected for each vacancy filled as identified by number nineteen above:

a. Name, sex, race/identification, positions considered for, and date(s) of consideration;

b. Individual qualifications as of date of consideration, including but not limited to, applications, test(s) results, interview ratings, and all documents showing changes in qualifications subsequent to being hired,

including but not limited to nature of change and date of change:

c. Complete individual evaluation history indicating date of evaluation, rating and name, job title, sex, race/identification of person giving evaluation;

d. Complete individual salary history showing each change in salary, date, and reason for change;

e. Complete individual job title history showing each change in job title, date and reason for change, indicating whether promotion, demotion, transfer, or other action;

f. Complete individual training history showing type of training, date, and reason for training;

g. If selected, provide date, position(s), and name, job title, sex, race/identification of persons making selection decision, indicating whether promotion, transfer, reassignment, or other action;

h. If not selected, provide date, reason(s) for nonselection, and name, job title, sex, race/identification of person(s) making selection decision for each position where considered but not selected. (If Lists are being provided, see suggested formats 3a and 3b.)

21. Lists or Documents setting forth the following information for each external candidate seeking consideration for, including those selected for, each vacancy filled as identified by number nineteen above:

a. Name, sex, race/identification, date of application, position(s) considered for, and date(s) of considertion;

b. Individual qualifications considered, including but not limited to, applications, test(s) results, interview ratings, and all other records indicating qualifications;

c. If hired, provide the date, position, salary or wage, and name, job title, sex, race/identification of person(s) making selection decision;

d. If not hired, provide the date and reason for nonselection, and name, job title, sex, race/identification of person(s) making selection decision. (If Lists are being provided, see suggested formats 3a, 3b, 3c.)

22. Lists or Documents setting forth the following for all employees by EEO-1 categories (e.g., in EEO-1 categories official and manager, professional, technical, and craft workers, or at all locations) on the payroll anytime during the period October 1, 1977, to date, including the following information for each:

a. Name, sex, race/identification and date of hire;

b. Position, job title, salary, and salary grade as of date of hire;

c. Individual qualifications as of date of hire, including but not limited to, applications, tests, interview ratings, resumes, references, and all other records showing qualifications;

d. All changes in individual qualifications subsequent to being hired,, including but not limited to, nature of change and date of change;

e. Complete individual evaluation history indicating date, evaluation rating, and name, job title, sex, and race/identification of person giving evaluation;

f. Complete individual salary history, including salary change, the amount, date, and reason for change, specifying each change in salary grade;

g. Complete individual job title history showing each change in job title, date and reason for change, indicating whether promotion, demotion, transfer, or other action;

h. Complete individual disciplinary history, including date, reasons for, and method of discipline, nd name, sex, race/identification, job title(s) of person(s) administering and responsible for each disciplinary action;

i. If no longer employed, date and reason for separation.

(If Lists are being provided, see suggested formats 4a and 4b.)

23. Lists or Documents setting forth the following information for each employee who separated, including involuntary and voluntary separations fromt he facility anytime during the period February 1, 1978, to date:

a. Name, sex, race/identification and date of hire;

b. Date and reason for separation;

c. Job title, EEO-1 category, salary or wage and department as of date of separation;

d. A copy of any summary report showing separations identified above.

(If Lists are being provided, see suggested formats 4a, 4b.)

24. Lists or Documents showing for all training programs, tuition refund programs and any other special program in effect anytime during the past three (3) years the following:

a. Name and type of program;

b. Procedures for informing employees about program;

c. Application procedures, eligibility requirements, and qualifications for selection;

d. Job(s) for which participants are trained;

e. Total number of employees of each sex, race/identification who participated in each program.

(If Lists are being provided, see suggested format 5.)

25. For any computer file maintained by the Company or any other entity at anytime from 1976, to date, containing Company personnel information, such as personnel, payroll seniority, work history, etc., provide Lists or Documents with the following information separately for each such file:

a. The name of the file;

b. Name, model number, configuration and location of the computer on which the file is kept;

c. Medium on which the file is kept (e.g., tape, disk, cards, etc.);

d. Date on which the company started using the file, and if the file is no longer used, the date the use of the file was discontinued;

e. File documentation, including file layouts and formats; and showing the number of records maintained in the file; and with the following information for each type of record:

1) Name of records;

2) When and how such a record is generated;

3) Minimum and maximum number of each type of record contained in file;

4) Name and description of each field on the record;

5) Description of all codes associated with each field on the record (e.g., termination codes, job codes, etc.).

f. Categories of employees on which the file contains information;

g. For each file which contains information on inactive and/or terminated employees include with the Lists or Documents the following:

1) The length of time information regarding such employees is retained on the file;

2) Time and method by which the file is purged of information regarding such employees;

3) How, where, and on what medium such purged data is stored and for how long.

h. The name and description of each report which is regularly generated from the file, and include with the Lists or Documents the following on each report:

1) Name, title, and business address of person(s) having custody of report;

2) Purpose and use of report;

3) Sample of one or two pages of report.

26. Separately for each computer file identified in Item 27, provide Lists or Documents which show:

a. The intervals at which copies are generated or the file preserved (e.g., yearly, quarterly, monthly, etc.);

b. The date on which copies began to be kept or files preserved;

c. The date of each copy of preserved file.

27. Lists or Documents showing the name and describing each generalized information retrieval program and/or report generator (e.g., Mark IV Score, etc.) maintained or utilized by the Company, including but not limited to, commercially available programs/packages, and identity of the company which developed each such program.

28. Lists or Documents showing for any of the data identified in Items *4, 5, 10, 11, 15, 18-24,* or any other Items, its availability in full or in part in machine readable form, including the specific information available under each Item and the time period available.

29. Lists or Documents which show or identify the person(s) by name, job title, and business address; responsible for maintaining each document, list, compilation, summary, and record provided in response to this Subbpoena.

Issuing Official

W. Ed Mansfield
District Director
1601 Olive Street
St. Louis, MO 63103

ON BEHALF OF THE COMMISSION:

DATE: 5-15-80

COMPANY XYZ .

SUMMARY OF CURRENT EMPLOYEES AS OF _____ 1978

JOB TITLE	JOB CODE	SALARY RANGE	SALARY LEVEL	FREQ	ALL EMPLOY TOT	ALL EMPLOY MALE	ALL EMPLOY FEM	BLACK TOT	BLACK MALE	BLACK FEM	HISPANIC TOT	HISPANIC MALE	HISPANIC FEM	OTHER TOT	OTHER MALE	OTHER FEM
DIVISION XXXXXXXXXXXXX																
DEPARTMENT FINANCE																
OFFICIALS AND MANAGERS																
VICE PRESIDENT - FINANCE			20													
ACCOUNTING MANAGER			18													
FORECASTING MANAGER			18													
COST CONTROL MANAGER			17													
ACCOUNTING SUPERVISOR			15													
XXXXXXXXXXXXXXXX			15													
XXXXXXXXXXXXXXXX			15													
TOTAL OFFICIALS AND MANAGERS																
PROFESSIONALS																
ACCOUNTANT, SR.			14													
BUDGET ANALYST, SR.			14													
ACCOUNTANT , JR.			12													
BUDGET ANALYST, JR.			12													
XXXXXXXXXXXXXXXX			12													
XXXXXXXXXXXXXXXX			11													
TOTAL PROFESSIONALS																
OFFICE AND CLERICAL																
ACCOUNTING CLERK			7													
BUDGET CLERK			5													
SECRETARY			5													
XXXXXXXXXXX			4													
XXXXXXXXXXX			3													
TOTAL CLERICAL																
TOTAL - FINANCE DEPARTMENT																

SUGGESTED FORMAT FOR ITEM 4 -
Summary of the Workforce

Suggested Format 2 (May be used in response to item 18)

In the chart below listing traditional sources for recruiting applicants, indicate for each job category, the approximate percentage of new hires during the period _____ to the present which have come from each source. Each vertical column should total 100%.

Source	Off/Mgr.	Professional	Technicians	Sales	Clerical	Craft	Operatives Laborer, Servic
1. Self-Referral, Walk-In, or Write In							
2. Public Employment Agency							
3. Private Employment Agency							
4. Employee Referral							
5. College or University							
6. Technical, Vocational School							
7. Media or Advertising							
8. Minority-Female Organizations							
9. Professional Organizations							
10. Corporate Recruiting Firms							
11. Industry Sources							
12. Referral Unions							
13. Other							

. LISTING OF PERSONS HIRED - Provide the following information on all persons hired during the period_____ grouped by EEO-1 Category and job title and within job title by date of hire.

Job Hired Into											
EEO-1 Category	Job Title and Job Code	Date of Hire	Department	Salary Level & Amt or Wage Rate	Status*	Name of Person Hired	Race Ethnic ID	Sex	Job Applied For	Date of Appl.	Recruitment Source

* Status - Full-time, Part-time, Temporary, Rehire

. LISTING OF APPLICANTS NOT HIRED Not Provide the following information on all applicants not hired, not provided uding college recruits, grouped by EEO-1 Category and job applied for and then by date of application

EEO-1 Category	Job Applied For	Date of Application	Name of Applicant	Race Ethnic ID	Sex	Recruitment Source	Disposition
							If not hired, provide reason for rejection. If application held p further consideration, s time period held.

Recruitment Sources - Self-Referral, public employment agency, private employment agency, employee referral, college or university, vocational or trade school, media ads, minority or female organizations, professional organizations, referral unions, industry sources, recruiting firms, or other (please state).

(THIS PAGE INTENTIONALLY LEFT BLANK)

Suggested Format 3c (May be used as response to [illegible]

LISTING OF PROMOTIONS - Provide the following information on all persons promoted during the period grouped by EEO-1 Category and job title promoted to and within job title by date of promotion. Do not include routine salary increase or upgrades on this chart.

Date of Promotion	Job Promoted To				Name of Employee	Race Ethnic ID	Sex	Previous Job	Dat Hir
	EEO-1 Category	Job Title and Job Code	Department	Salary (Level and Amt) or Wage Rate				EEO-1 Category, Job Title Dept., Salary(Level and Amt) or Wage Rate, Years in this Title, Location if different	

Suggested Format 4a (May be used in response to items 23 & 24)

LISTING OF SEPARATIONS - Provide the following information on all employees who separated from the facility for the period _____, grouped by EEO-1 Category and job title and then by date of separation. This listing should include both voluntary and involuntary separations.

JOB SEPARATED FROM									
EEO-1 Category	Job Title and Job Code	Date of Separation	Salary or Wage	Department	Name of Employee	Race Ethnic ID	Sex	Date of Hire	Reason for Separat

Suggested format 4b (May be used in response to item 23)

Summary of Separations. - For the period _____, provide information on all separations grouped by EEO-1 Category and Job Title.

EEO-1 Category	Job Title	All Separations			Black			Hispanic			Other Minority			White		
		Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female

Suggested format 5 (May be used in response to item 24)

Special Programs - Attach description of each program, including size, cycling, procedure for informing employees of program, application procedures, eligibility, curriculum length,

Training Programs by name of program. List all groups during past 3 years	Total			Black		SSA		Other Min.		White		Dates of Program	Describe qualifications for selection, & job(s) for which participants are trained.
	All	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		
Tuition Refund Report usage in past 3 years													
Other													

EXHIBIT I—PROOF OF SERVICE

PROOF OF SERVICE

I hereby certify that being over 18 years of age and not a party to or any way interested in these proceedings, I duly served a copy of the subpoena on the persons named in this subpoena.

- ☐ in person
- ☒ by registered mail
- ☐ by leaving a copy with a responsible person, at the principal office or place of business, to wit:

Name Vivian L. Lawson

Position Clerk-Typist

Address [illegible]

On 5/15/80
(Mo, day & year)

Vivian L. Lawson
(Signature of person making service)

Clerk-Typist
(Official title, if any)

State [illegible]

Parish/
County [illegible]

CERTIFICATION OF ATTENDANCE

I certify that the person named herein was in attendance and satisfactorily produced the records requested or gave oral testimony at

_____

On _____
(Mo, day & year)

_____
(Signature of certifying E.E.O.C. official)

_____
(Official title)

NAME AND ADDRESS OF SENDER: EEOC
1601 Olive
St Louis, Mo 63103

Indicate type of mail
☐ REGISTERED ☐ COD
☐ INSURED ☐ CERTIFIED

Affix stamp here if issued as certificate of mailing or for additional copies of this bill.
POSTMARK AND DATE OF RECEIPT

NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST-OFFICE ADDRESS	POSTAGE	FEE	Handling Charge	Actual Value (If Registered)	DUE SENDER IF C.O.D.	R. R. FEE	S. D. FEE	S. H. FEE	REST. DEL. FEE / REMARKS
226791	Shell Oil Company Roger Rice, Administrative Superintendent PO Box 1262 West Pine, IL 62095									
0										
1										
2										
13										
14										
15		445pm								

SAINT LOUIS, MO. MAY 15 1985 USPO

Exhibit 12

TOTAL NUMBER OF PIECES LISTED BY SENDER: One

TOTAL NUMBER OF PIECES RECEIVED AT POST OFFICE: One

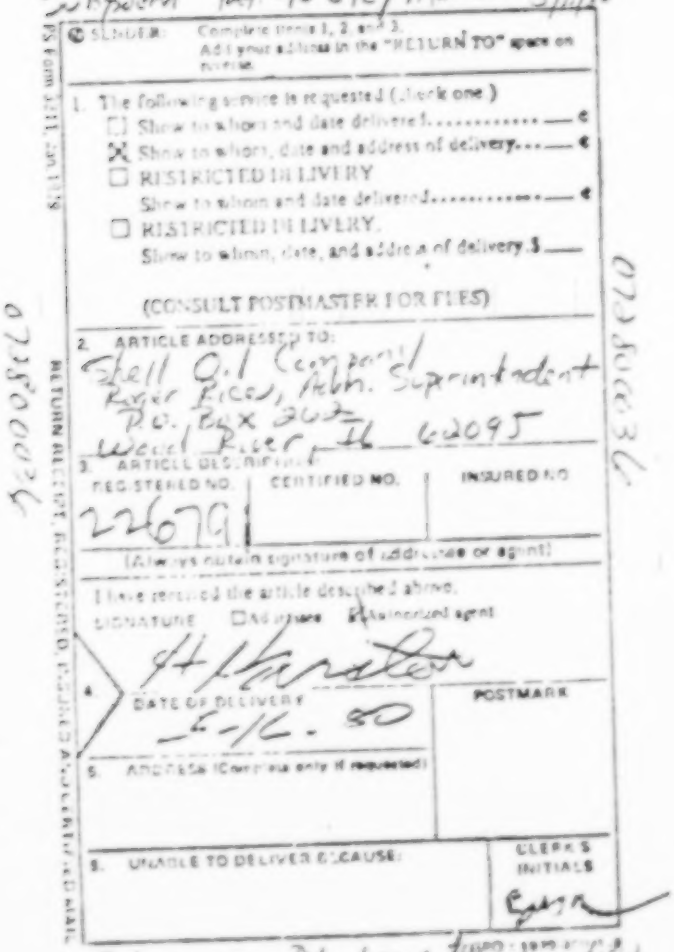
POSTMASTER, PER (Name of receiving employee): D Thompson

Declaration of value is required on international registered mail.
Special-handling charges apply only to third- and fourth-class parcels. Special-delivery service also includes special-handling service.

FORM MUST BE [illegible]LETED BY TYPEWRITER, INK OR BALL POINT PEN

5B

Subpoena Del. to CIC/Marlow 5/5/10



SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
- ☐ Show to whom and date delivered..... ¢
- ☒ Show to whom, date and address of delivery..... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered..... ¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery $ ____

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
Shell Oil Company
Roger Rice, Admin. Superintendent
P.O. Box 202
Weeks River, IL 62095

3. ARTICLE DESCRIPTION

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
22679		

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☒ Authorized agent

4. DATE OF DELIVERY 5-11-10

POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

PS Form 3811, July 1983 RETURN RECEIPT, REGISTERED, CERTIFIED, AND INSURED MAIL

7200052

02 5000 36

Subpoena Rel to CIC/Marlow 5/5/10

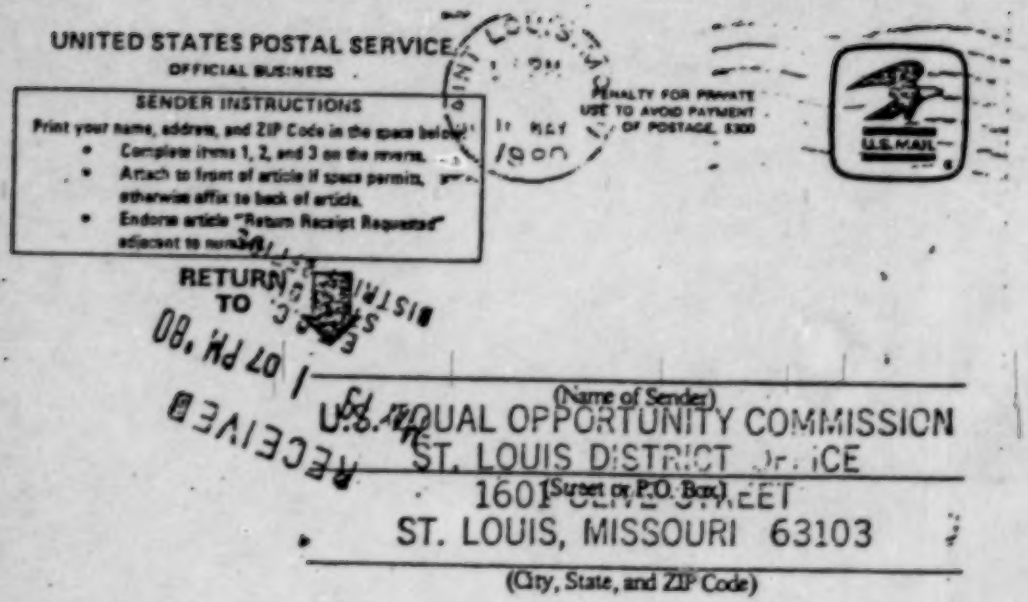

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS
SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
• Complete items 1, 2, and 3 on the reverse.
• Attach to front of article if space permits, otherwise affix to back of article.
• Endorse article "Return Receipt Requested" adjacent to number.
PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
U.S. MAIL
RETURN TO
RECEIVED
U.S. EQUAL OPPORTUNITY COMMISSION
ST. LOUIS DISTRICT OFFICE
1601 OLIVE STREET
ST. LOUIS, MISSOURI 63103
(Name of Sender)
(Street or P.O. Box)
(City, State, and ZIP Code)

EXHIBIT J—PETITION TO REVOKE OR MODIFY SUBPOENA

COMMISSIONER'S CHARGE
No. 072800036

In the Matter of

ELEANOR HOLMES NORTON

v.

SHELL OIL COMPANY

PETITION TO REVOKE OR MODIFY SUBPOENA NO. 80-35

TO THE ST. LOUIS DISTRICT DIRECTOR
OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION:

On behalf of Porter E. Slack, Manager, Industrial Relations of Shell Oil Company's Wood River, Illinois refinery, we respectfully submit this petition to revoke or modify Subpoena No. 80-35 which has been issued in the above matter. A copy of the Subpoena is appended as Attachment A.

1. The Subpoena should be revoked in its entirety for the following reasons:

a. The Commissioner's Charge herein has been wrongfully filed without reasonable or sufficient cause. The charge does not comply with the text or purpose of section 706(b) of title VII, which requires that all charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Further, it does not comply with the text or purpose of section 1601.12 of the Commission's own internal regulations, which provide that a charge should contain "a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." These provisions are intended to prevent the burdening and harassing of employers in unwarranted

circumstances. Such are the circumstances here. Shell's Wood River, illinois refinery has an admirable record with respect to equal employment opportunities. As detailed in a letter to you from Shell, dated March 7, 1980, blacks and women constitute, respectively, 4.7% and 8% of the available labor market for the Wood River refinery. Since the effective date of the Civil Rights Act of 1964, 12.3% of the employees hired at Wood River have been black and 9.8% have been women. As a result of these affirmative action efforts, blacks are employed at Wood River at almost twice the precentage of their availability and women are employed at approximately the same percentage of their availability. Moreover, the Wood River hiring rate for blacks and females from 1977 through 1979 significantly exceeded their availability in the labor market, and the promotion of blacks and females from 1977 through 1979 exceeded their representation in the internal work force. There has been no EEOC individual charge of race or sex discrimination filed by an employee of the Shell Wood River refinery for the last six years, and only two charges have been filed in the last ten years, both of which were dismissed. The EEOC has applied an arbitrary targeting procedure that in no way relates to any sufficient or reasonable cause for issuance of Commissioner Charges.

b. Title VII does not contemplate or authorize an audit review procedure of simply issuing Commissioner Charges for securing access to documents in order to then determine if there is any cause to believe that discrimination has occurred.

c. The Subpoena violates Shell's right to due process guaranteed by the Fifth Amendment to the Constitution. For the purpose of this allegation, Shell realleges each and every point contained in subparagraphs a and b of this petition. Despite repeated requests from Shell, the EEOC has failed to provide Shell with the facts or dates of any alleged unlawful employment practices. In circumstances such as these, where Commissioner Norton's Charge is unfounded and where

Shell has made persistent good faith affirmative efforts to comply with Title VII, the issuance of the Commissioner Charge and the subsequent Subpoena violate Shell's rights of due process.

d. The Subpoena states that any compilations or summaries requested are to be provided to the extent that they "are maintained or can be produced through computer or other mechanical sources available to the respondent to produce such materials." Thus, the Subpoena requires Shell to utilize its computer resources to create documents and summaries that do not now exist. This requirement to make compilations is inconsistent with Title VII and the Subpoena authority of EEOC under Title VII. This deficiency applies to many of the Requests in part or in whole from Nos. 1 through 29 (particularly Requests 4, 5, 8, 10, 11, 13, 16, 23, 25 and 29).

e. Under the terms of section 10 of Title VII—which adopts section 11 of the National Labor Relations Act—a subpoena for the production of evidence shall be revoked where it is determined that the evidence sought "does not relate to any matter under investigation." This standard of relevance is narrower than the "reasonably calculated to lead to discovery of admissible evidence" standard provided for in Federal Rule of Civil Procedure 26(b). Particularly in light of the absence of any definition of the alleged discriminatory acts being investigated, the information sought in Items 1 through 29 is not relevant.

f. Particularly with respect to Items 4-6, 10-15, 17-23, 25-26 and 28-29, the documents requested would be extremely costly and burdensome to produce. This burden would substantially interfere with the operations of the facility. In order to furnish the requested material to the Commission, Shell would have to perform an extensive search for and duplication of material at an onerous cost in time, labor and money. Though ambiguous, the items could require review of most, if not all, of the personnel files of the facility and under Item 29 a statement of the custodian of each such per-

sonnel record. For example, Item 10 calls for a search, collection, and description of "each report regularly or specially prepared by or for the Company at any time since 1977" concerning personnel actions. Obviously, searching for and collecting these materials would impose a great burden.

g. The Equal Employment Opportunity Commission has not given Shell necessary assurances that it will not provide the documents requested in Items 1 through 29 to outside consultants. It is our understanding that EEOC frequently retains an outside consultant by contract to review investigatory materials, particularly computer data. In so doing, EEOC provides the contract consultant with company records, tapes or related documents. This practice violates the text and purpose of Title VII and implementing regulations. In these circumstances, it is appropriate to refuse to provide the requested information without an assurance from EEOC that access to any data supplied by Shell will not be provided to a contract consultant or any other individual not an employee of the government.

h. EEOC has not made necessary provisions for advance payment for any and all documents which Shell must reproduce or for the costs that may be incurred.

i. The request for information format used here, which is the subject of the Subpoena, has been issued in violation of the Federal Reports Act, 44 U.S.C. § 3509, and Executive Order 12174 and is, therefore, unenforceable. In light of the procedures used here and, apparently, in other cases, these form requests for information require prior review and a provision of a clearance number by the Office of Management and Budget.

j. To the extent that the items call for manual compilations or are in the nature of interrogatories, they are inappropriate for the reason indicated in subparagraph d. above.

k. In many respects, the subpoena is internally inconsistent, ambiguous and incapable of being re-

sponded to in any reasonable manner. For example, it begins with the statement that, "Each numbered item shall apply to all departments, employees and positions . . . at any time since 1965, unless otherwise indicated." The next paragraph, however, requires that "Each item is to be answered separately for each year from January 1, 1976 to the present, unless otherwise indicated." The Subpoena provides two inconsistent "instructions." Further, the definition of "Test" is completely unintelligible:

> . . . any paper and pencil or performance measure used as two (2) basis for any employment decision . . .

Ambiguity also appears in Item 4. It asks for "Lists or documents which show for each year as of April 1, 1978, and April 1, 1979" certain information. Is Shell supposed to produce only documents (or "Lists") which relate to these specific dates or bear such dates, or does the subpoena specification call for something different? The same holds true for Item 5, which is worded in the same fashion.

2. Except for Items 2 and 29, the Subpoena should be modified or revoked because it requests extensive documentation regarding events occurring more than 180 days prior to the filing of the Commissioner's Charge. Charges filed under Title VII are limited to events occurring within 180 days prior to the date on which the charge is filed. Reaching back to an earlier time period for burdensome requests is inappropriate.

3. Items 25, 26, 27 and 28 should be revoked because the information sought regarding Shell's Wood River computer files and computer capability is irrelevant to the Commissioner's Charge. The information obviously is sought merely as background information for a further request by the Commission that Shell compile information for the EEOC by use of its computer capability. Such compilations are not required under the case law, and, therefore, this request regarding computer files and computer capability need not be fulfilled.

4. Items 2, 3, 4, 5, 7, 8 and 11 should be revoked or modified because the information sought in these items is either completely or partially duplicative of information already provided by Shell to the government.

5. Items 7, 10, 16 and 22-29 should be revoked or modified in whole or in part because they contain confidential and privileged information including trade secrets and other business data. For example, Items 7 and 10 request hiring or growth projections by job groups the disclosure of which would be to the competitive disadvantage of the Company.

6. Items 1, 5, 8, 10, 11, 14 and 19 should be revoked or modified in whole or in part because the subpoena for the information requested in these items is inappropriate. The District Director and the Commission have made no prior request for the information sought in these items in compliance with section 709(a) of Title VII.

RESPECTFULLY SUBMITTED,
MARTIN SCHNEIDERMAN
MARK GOODWIN
Steptoe & Johnson
1250 Connecticut Avenue
Washington, D.C. 20036
202/862-2000
Attorneys for Petitioners

EXHIBIT K—DETERMINATION ON PETITION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1601 Olive Street
St. Louis, Missouri 63103

Charge No. 072800036
Subpoena No. SL-80-35

IN THE MATTER OF:

ELEANOR HOLMES NORTON

v.

SHELL OIL COMPANY

Addressee:
Roger Rice, Administrative Superintendent
P.O. Box 262
Wood River, Illinois 62095

DETERMINATION OF PETITION
TO REVOKE OR MODIFY SUBPOENA

Respondent/Petitioner (hereinafter Respondent) having been served with a subpoena duces tecum issued by the Director of the St. Louis District Office, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, has timely filed a petition to revoke or modify the subpoena. Having reviewed the subpoena and the record in the case, the District Director, pursuant to the Commissioner's regulations, 29 C.F.R. 1601.19(b), hereby denies in part and grants in part the petition to revoke or modify for the reasons stated below.

For the most part, Respondent's petition is not in conformity with the requirements of the Commission's Procedural Regulations[1] insofar as Respondent fails to identify the specific portions of the subpoena with which Respondent does not intend to comply and the grounds on which Respondent relies. However, I will respond to Respondent's objections in turn.

[1] 29 C.F.R. Section 1601.16(b).

Respondent first contends that the Commissioner's charge has been filed without cause and does not comply in form with the Commission's internal regulations in that a clear and concise statement of the facts constituting the alleged unlawful employment practices is not contained within the charge. The Commisioner's charge against Respondent was issued pursuant to and in conformity with the published standards for the selection of systemic respondents contained in Section 16.2 of the Equal Employment Opportunity Commission Compliance Manual, and pursuant to the published authority for the issuance of Commissioner's charges, contained in the Commission's Procedural Regulations, 29 C.F.R. Section 1601.11. The charge specifically sets out in two numbered paragraphs the alleged unlawful employment practices which are the subject of the investigation. It is not necessary that a Commissioner's charge contain specific incidents of discriminatory acts or practices. *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d (5th Cir. 1975); *Spartan Southwest, Inc.* v. *EEOC*, 461 F.2d 1055 (10th Cir. 1972); *Sheetmetal Workers* v. *EEOc*, 439 F.2d 237 (9th Cir. 1971). Accordingly, Respondent's objection fails.

Respondent next contends that the Commission is utilizing a Commissioner's charge for the purpose of conducting an "audit review" of Respondent's Wood River Facility. This argument has been answered above.

For its next objection, Respondent states that the subpoena violates its Fifth Amendment right to due process of law. In support thereof, Respondent realleges generally its first two arguments relating to the authority of the commission to issue the charge and specifically alleges that the Commission has failed to provide Respondent with facts and dates relating to the discriminatory practices alleged in the charge. Respondent's first two objections have been answered above. As for Respondent's "notice" argument, the Commissioner's charge issued against Respondent contains specific allegations of discriminatory employment practices utilized by defendant with respect to Blacks and females in certain specified job categories. As specific incidents of discriminatory acts or practices need not be alleged (*Spartan*

Southwest, Inc. v. *EEOC*, *supra*; *Sheetmetal Workers* v. *EEOC*, *supra*), the subpoena will not be modified or revoked for this reason.

Respondent next takes the position that any portion of the subpoena which requires Respondent to utilize computer or other mechanical sources available to it to produce compilations or summaries is outside the scope of the Commission's subpoena authority. The courts have held that the Commission's investigatory powers are sufficiently broad to encompass the authority to require a respondent to make compilations. *New Orleans Public Service, Inc.* v. *Brown*, *supra*; *Motorola, Inc.* v. *McLain*, 484 F.2d 1339 (7th Cir. 1973). See also *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*; *Georgia Power Co.* v. *EEOC*, 412 F.2d 462 (5th Cir. 1969). Accordingly, Respondent's argument fails.

Respondent next contends that all of the documents which are the subject of the subpoena are irrelevant under the standard set forth in Section 11 of the National Labor Relations Act in that the documents requested do not "relate to any matter under investigation." It is the Commission, not the party being investigated, that must determine what material is relevant to the investigation. *EEOC* v. *University of New Mexico*, 504 F.2d 1296 (10th Cir.1974). The Commission, after reviewing the information requested, has concluded that all of the information sought is both relevant and material to the allegations under investigation. See *EEOC* v. *Western Publishing Co., Inc.*, 502 F.2d 599 (8th Cir. 1974). The Commission must also be allowed to determine what is relevant evidence so that it can then decide whether or not there is reasonable cause to believe that Respondent is engaged in discriminatory employment practices *Pacific Maritime Assoc.* v. *Quinn*, 491 F.2d 1294 (9th Cir.1974); See also, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355 (6th Cir. 1969).

Respondent next advances the argument that compliance with the subpoena will be burdensome. The Commission recognizes that the production of the documents requested will put some burden on the Respondent. We note, however, that burdensomeness, expense and inconvenience are inherent in any compulsory process *H. Kessler Co.* v.

EEOC, 53 FRD 330 (N.D.Ga. 1971), aff'd, 469 F.2d 25 (5th Cir. 1972). Once it is established that the evidence sought is relevant, a mere assertion of burdensomeness is not a basis for non-compliance. *New Orleans Public Service, Inc.* v. *Brown, supra; Circle K Corp.* v. *EEOC*, 501 F.2d 1052, 8 EPD 9599 (10th Cir. 1973). The Commission has determined that the evidence sought is relevant. Respondent has not provided facts sufficient to establish that compliance will work an undue hardship on it. Accordingly, the Commission cannot credit Respondent's contention of burdensomeness.

Respondent contends that it need not comply with the Commission's subpoena because no assurances have been given that the documents requested will not be released to outside consultants for analysis. The Commission has been charged with the responsibility of investigating and redressing alleged violations of Title VII. In the process of discharging this duty, it sometimes is necessary for the commission to contract out work which is more efficiently and economically performed by outside consult. Statutory authorization for this can be found in Section 709(a) of Title VII which states as follows:

> "In connection with any investigation of a charge filed under Section 706, the Commission or *its designated representative* shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation." (emphasis added)

Any contract with an outside consultant would routinely contain a provision that the confidentiality of any information received from the Commission be maintained.

Respondent next states, as a ground for revocation of the subpoena, that no provisions for advanced payment for the cost of compliance have been made. It is well settled that an assertion of expense for compliance cannot justify refusal to comply where the subpoenaed information is relevant to the charge. *H. Kessler & Co.* v. *EEOC*, *supra*. Further, Respondent has never made any request for advance pay-

ment of the costs it may incur in complying with the subpoena. The Commission is authorized to contribute toward the costs of compliance and will make arrangements to do so when these expenses become less speculative.

Respondent next argues that the request for information which is the subject of the Commission's subpoena has been issued in violation of the Federal Reports Act, 44 U.S.C. Section 3509 and Executive Order 12174. Respondent misapplies these enactments. The request for information previously submitted to Respondent is not a form request which is uniformly sent out to all respondents who are the subject of a Commissioner's charge. Each such request is tailored to the specific respondent and allegations involved in the charge. Accordingly, Respondent's argument fails.

Respondent next maintains that insofar as the subpoena requests Respondent to make manual computations, it should be revoked as compilations are not the proper subject of the subpoena. As stated above, the courts have held that the Commission's investigatory powers include the authority to require a respondent to make lists or compilations. See p. 2, infra. However, a close reading of the subpoena will reveal that the Commission has asked only for manual compilations or lists, *if* maintained by Respondent. Otherwise, documents are to be produced. The only compilations that Respondent is asked to make for purposes of complying with the subpoena are those which can be produced through computer or other mechanical sources available to Respondent.

Respondent contends that the subpoena is ambiguous and inconsistent. We do not agree. An administrative subpoena need only describe documents with sufficient particularity to identify to the petitioner the nature of the information sought. *Brown* v. *United States*, 276 U.S. 134 (1927); *Oklahoma Press Publishing Co.* v. *walling*, 327 U.S. 186 (1946). The request meets this standard. The instructions on page one of the subpoena which Respondent points to as being inconsistent are indeed consistent. The sentence which is worded "Each numbered item shall apply to all departments, employees and positions ... at any time since 1965, unless otherwise indicated" defines the *object* of each

request. The next sentence "Each item is to be answered separate for each year from January 1, 1976, to the present, unless otherwise indicated" defines the time limits for each request. Items 4 of the subpoena is also clear. The item requests certain enumerated information relating to job titles in existence as of April 1, 1978, and as of April 1, 1979. However, in so far as Respondent has indicated that the subpoena is ambiguous with respect to the definition of "Test," the subpoena shall be modified to read as follows:

> "'*Test*' refers to any paper and pencil or performance measure used as a basis for any employment decision including, but not limited to, any measure of general intelligence, knowledge, specific intellectual abilities, physical abilities, technical skills, mechanical, clerical, or other aptitudes, dexterity and coordination, knowledge and proficiency, occupational and other interest, attitudes and personality;..."

Respondent next asserts that the subpoena should be modified or revoked because, except for Items 2 and 29, it requests information which occurred outside the relevant time period. Respondent asserts that the relevant time period is six months. The temporary scope of the Commission's investigation is not limited to any specified amount of time, so long as the information sought is relevant to the charge. Since actions gain meaning by reference to other actions which surround them in time, the Commission is entitled to review documents spanning a length of time in order to establish whether discriminatory patterns exist in Respondent's employment practices. *EEOC* v. *Univeristy of New Mexico*, *supra*. As the time frames set out in the subpoena are not unreasonably lengthy, the subpoena will not be revoked on this ground.

Respondent argues that Items 25, 26, 27 and 28 should be revoked as irrelevant since they request information regarding Respondent's computer capabilities. The Commission does not agree. These items were designed to elicit information which in the event that future data requests are necessary, the requests can be framed in a manner most suitable to Respondent's capacity to produce the requested

information. To this end, the information requested in 25, 26, 27 and 28 is relevant and must be produced.

Respondent contends that Items 2, 3, 4, 5, 7, 8 and 11 should be revoked because the information requested has already been provided to the government. This assertion is unsupported by any proof whatsoever. However, even if it were so, none of the information requested has been previously supplied to the Equal Employment Opportunity Commission. The subpoena will not be revoked or modified because it is duplicative as Respondment maintains.

Respondent claims that Items 7, 10, 16 and 22-29 should be revoked or modified because they request information which is confidential and privileged. The information requested is not privileged so as to exempt it from discovery. The Commission has the right during the investigation to compel production of any material or evidence that is relevant to any claim made in the charge. *EEOC* v. *General Electric Co.*, 532 F.2d 355 4th Cir. 1976). The touchstone of relevancy is that the information relates to or touches upon the matter under investigation. *Motorola* v. *McLain*, *supra*. The Commission concludes that the information requested relates to and touches upon the matter under investigation and as such is discoverable evidence. As for Respondent's confidentiality objection, the Commission is satisfied that the prohibition against disclosure of information provided for in Section 709(e) of Title VII is a sufficient safeguard that no breach of confidentiality will occur.

Finally, Respondent contends that Items 1, 5, 8, 10, 11, 14 and 19 should be revoked because they request documents and information not previously requested. To the contrary, the Commission's First Data Request included substantially the same requests for information as did the subpoena, although not necessarily in the same form. Furthermore, the Commission's letter of April 11, 1980 contained Attachment B which requested all of the information requested in the subpoena. Accordingly, the subpoena will not be revoked or modified.

DETERMINATION:

Respondent's petition to revoke is denied. The subpoena is modified to the extent noted above and to the extent that the addressee, Roger Rice, is directed to appear before Terry Marlow, of the United States Equal Employment Opportunity Commission, at 1601 Olive Street in the city of St. Louis, Missouri on Wednesday, June 25, 1980 at 10:00 o'clock a.m. of that day at said time and place and produce all of the documents and records described in the subpoena.

FOR THE COMMISSION:

/S/ JOHN F. NICHOLSON
for
W. ED. MANSFIELD
District Director

JUNE 9, 1980

EXHIBIT L— APPEAL OF DETERMINATION

BEFORE THE UNITED STATES
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Commissioner's Charge
No. 072800036

IN THE MATTER OF

ELEANOR HOLMES NORTON, PETITIONER,

v.

SHELL OIL COMPANY, RESPONDENT.

APPEAL OF PETITION TO REVOKE OR MODIFY SUBPOENA SL-80-35

TO THE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:

Pursuant to 29 C.F.R. § 1601.16, Shell Oil Company ("Shell") and Porter E. Slack, Manager, Industrial Relations, and Shell's Wood River, Illinois Refinery, respectfully submit this appeal of a determination by St. Louis District Director W. Ed Mansfield partially denying Shell Oil Company's Petition to Revoke or Modify Subpoena SL-80-35. A copy of the subpoena is appended as Attachment A, Shell's Petition to Revoke or Modify Subpoena ("Petition") is attached as Exhibit B, and the District Director's Determination on Petition to Revoke or Modify Subpoena ("Determination") is attached as Exhibit C.

As part of this appeal, Shell resubmits and incorporates by reference each of the arguments in its Petition. Shell requests that the General Counsel of the Equal Employment Opportunity Commission ("Commission") reexamine the District Director's refusal to recognize the merit of Shell's position and overrule the District Director's contentions as set forth in the Determination.[1]

I. CONGRESS DID NOT INTEND TO REDUCE THE CHARGE-FILING PROCESS TO A HOLLOW CHARADE

In rejecting the arguments contained in paragraphs 1(a)-(c) of Shell's Petition, the Determination misconstrues Shell's position as simply raising technical pleading objections. Shell's arguments are far broader. The Petition raises questions with respect to the Commission's compliance with statutory and regulatory standards; its failure to provide reasonable notice; and its flouting of procedural safeguards to protect employers against groundless charges.

The core of Shell's objections to the subpoena is that it is based on a conclusory and inadequate charge which is without substantive basis and which violates the Commission's own regulations. The charge filed by Commissioner Norton uses boilerplate language to allege discrimination against blacks and women in broad job categories. Commissioner Norton's affidavit only offers the conclusory statement that she has "cause" to believe that Shell committed the unlawful employment practices set forth in the charge.

If this sham procedure were sufficient to satisfy the requirements of Section 706 of the Civil Rights Act, then Congress was wasting its time in requiring that all charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Why require the Commission to proceed on the basis of sworn charges, if a charge need not be based on minimum standards of specificity and credibility?

---

[1] The District Director contends that:

> For the most part, Respondent's petition is not in conformity with the requirements of the Commission's procedural regulations insofar as Respondent fails to identify the specific portions of the subpoena with which Respondent does not intend to comply and the grounds on which Respondent relies.

Determination at 1. Contrary to this characterization, each numbered paragraph of Shell's Petition explicitly states that it seeks revocation either of every item within the subpoena or of certain identified items within the subpoena. Shell's position on each objection is quite clear. Indeed, the Determination itself reflects that the District Director experienced no difficulty in identifying each of the subpoena items to which Shell objected in its petition.

In fact, the Commission has established such standards, with which Commissioner Norton's charge does not comply. Section 1601.12 of the Commission's regulations provides that a charge should contain "a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." The District Director's apparent response is that this regulation does not mean what it says, but rather that "it is not necessary that a Commissioner's charge contain specific incidents of discriminatory acts or practices." Determination at 2. such a conclusion does not comport with the plain Congressional intent that the oath requirement be part and parcel of a duty assumed by filing parties—including Commission members—not to file charges without foundation.

As originally enacted, Title VII permitted a member of the Commission to file a charge under the Act, in writing, when he or she had "reasonable cause" to believe a violation of the Act had occurred. However, in 1972 Congress amended Section 706(b) to require Commissioner charges to be filed "in writing under oath or affirmation" and to contain the information which the Commission requires.[2] By this amendment, Congress intended to hold the Commission to a *higher* standard for filing a Commissioner's charge than it had under the old reasonable cause standard. *Equal Employment Opportunity Commission* v. *Appalachian Power Company*, 13 F.E.P. Cases 1294 (W.D. Va. 1976), *aff'd for reasons set forth by District Court*, 568 F.2d 354 (4th Cir. 1978); *Stewart* v. *Core Laboratories, Inc.*, 460 F. Supp. 931 (N.D. Tex. 1978). The intent of Congress and the meaning of Section 706(b) are that employers are to be protected against harassing and baseless charges filed either by members of the public or by Commissioners. The conclusory allegation that a charge has been issued for "cause" is not sufficient.

Though some courts have permitted broad investigations based on seemingly narrow charges, no court has permitted

[2] Congress can be presumed to have been aware that the Commission had promulgated regulations containing the requirements of present § 1601.12, calling for detailed factual support for allegations contained in charges, as early as 1966. 31 Fed. Reg. 10269 (July 29, 1966).

an open-ended investigation based on no charge at all, the approach attempted by the Commission in this case. Commissioner Norton has not offered even a single allegation of an instance of concrete discrimination in support of her charge. As the Petition shows, no individual charge has been filed with the Commission against the Wood River Refinery for six years. Over the past decade, only two discrimination charges have been filed against the facility, both of which were dismissed by the Illinois Fair Employment Practices Commission.[3] Nor does the statistical data now in the Commission's possession provide a basis for finding reasonable cause. Such data, much of it provided by the respondent, reflects that the Wood River Refinery has hired and maintained a workforce in which blacks and women are represented at levels equal to or greater than their availability in the appropriate labor market.[4] It can only be concluded that the Wood River Refinery has been selected for enforcement action on the arbitrary and capricious basis that a facility in the petroleum refinery industry represents an attractive "target of opportunity" for the Commission.

In summary, the Determination fails to show that a legal basis exists for issuance of a charge. The data available does not serve to support the actions taken here. Title VII does not authorize the Commission to take an "audit" approach in issuing charges and investigating companies: such audit functions, to the extent they are authorized, are within the jurisdiction of the Office of Federal Contract Compliance Programs ("OFCCP").[5] Nor did Congress intend to permit this Commission to use Commissioner's charges as a

[3] One of those two charges was also filed with this Commission, which administratively closed the case after the Illinois Commission dismissed the charge.

[4] *See* letter to the District Director from Mr. R. B. Rice, Administrative Superintendent, Wood River Refinery, dated March 7, 1980.

[5] In addition, such duplication of functions, in the context of requiring extensive form reports from a private respondent, contravenes the purposes and directives of Executive Order 12174, which seeks to eliminate duplicative federal paperwork burdens on the public (44 Fed. Reg. 69609 (November 30, 1979)).

device to initiate broad "fishing expedition" discovery against arbitrarily designated employers.

The Determination addresses Shell's due process arguments in much the same way as it does the sufficiency of the charge, by arguing that a simple assertion of discrimination suffices to meet all statutory and regulatory requirements. However, if the Commission has issued the charge without consideration of whether any factual basis for it exists, it has violated Shell's due process rights to be free of arbitrary and capricious agency action, including unwarranted charges and investigation.

II. SHELL CANNOT BE REQUIRED TO COMPILE DATA FOR THE COMMISSION

In paragraph 1(d) of the Petition, Shell objects to the Commission's use of a subpoena to require Shell to devote its programming and computing resources to perform compilations and develop new "documents." The Determination maintains that the Commission's investigatory powers extend to taking dominion over Shell's computers and programming staff. There is considerable precedent to the contrary: the Commission is not authorized to burden Shell with substantial time and expense of developing the compilations requested. See *Georgia Power Company* v. *EEOC*, 295 F. Supp. 950 (N.D. Ga.), *aff'd*, 412 F.2d 462 (5th Cir. 1969); *Joslin Dry Goods Co.* v. *EEOC*, 336 F. Supp. 941 (D. Colo. 1971), *aff'd in part and reversed in part*, 483 F.2d 178 (10th Cir. 1973). The Determination recognized the weak ground on which the Commission stands with respect to this issue when it disclaimed any intent to require Shell to perform manual compilations (see paragraph 1(j) of the Petition, Determination at 4). The same arguments apply to computer compilations, where such compilations are not otherwise performed in the ordinary course of business. It is impermissible for this Commission to burden Shell with the task of generating data for an unfocussed and open-ended investigation.

III. THE SUBPOENA MUST BE LIMITED TO DOCUMENTS WHICH ARE RELEVANT TO THE UNDERLYING CHARGE

In paragraph 1(e) of the Petition, Shell objects to the lack of any showing of relevance as to most of the subpoena. This objection underlines the absence of any explanation or factual detail in Commissioner Norton's charge. Relevance must be established by reference to adequate and specific charges. Where only vague and conclusory accusations are made, there is no reasonable method to assess whether information requested in a subsequent subpoena is relevant or not. In any event, items 25-28, relating to the computer capabilities of Shell, are patently beyond the relevant scope of the investigation (see paragraph 3 of the Petition).

IV. THE SUBPOENA IS BURDENSOME

The response of the District Director to Shell's burden objections (paragraph 1(f)) is confusing. The Determination initially takes the position that excessive burden is simply not a basis for objection to a relevant investigation. However, as previously noted, relevance has not been established; moreover, the arguable relevance of a subpoena request does not *per se* excuse the Commission from the duty of focusing its investigation without imposing undue hardship on the respondent.

The Determination then changes position, asserting no undue hardship has been shown. Thus, on one hand the District Director says that burden is not the basis for objection, and on the other hand claims that burden has not been factually established. The undue burden which the subpoena imposes is apparent even from a cursory review of its specifications. For example, specifications 4, 11, 19, 20, 21 and 22 request information which Shell does not maintain in a readily accessible form. Its retrieval will require inordinate search time. To respond to just one of these objectionable specifications, specification 22, Shell would have to search the personnel files of over 2500 current and former employees. The search would require at least 180 work days to assemble the information. This estimate does not include reproduction, clerical or attorney review time.

When those factors are added in and multiplied for just the cited specifications, the burden mandated by the subpoena is obvious.

V. THE COMMISSION HAS REFUSED TO RECOGNIZE ITS LEGAL OBLIGATION TO PROTECT CONFIDENTIAL DATA

With respect to pragraphs 1(g) and 5 of the Petition, the District Director confirms the practice of disclosing investigatory materials to outside contract consultants. According to the Determination, such a contractor is a "designated representative" of the Commission for review of the files pursuant to Section 709(a) and is not otherwise precluded by title VII from obtaining confidential data submitted by the respondent (Determination at 3-4). This assertion ignores the clear mandates of Section 706(b) and 709(b) of Title VII. These provisions preclude disclosure of investigatory materials to the public. Shell regards the disclosure of investogatory materials to a private government contractor to be disclosure to the public and violative of the statutory provisions even if the contract has a confidentiality provision.

To date, courts have indicated that these disclosure proscriptions are to be strictly construed. Indeed, the courts have found the Commission's regulations authorizing disclosure of these materials to charging parties as violative of Title VII. See, *e.g.*, *Sears Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978); *cert. denied* 440 U.S. 930 (1979); **EEOC** v. *Association Dry Goods Corp.*, 607 F.2d 1075 (4th Cir. 1979, *cert. granted*, Sup. Ct. (1980). *A fortiori*, these cases bar the release of confidential data to a third party contractor.

VI. THE COMMISSION HAS NOT PROVIDED FOR ADVANCE PAYMENT OF SHELL'S COSTS

With respect to paragraph 1(h) of the Petition, the Determination states that Shell "has never made any requests for advance payment of the costs that it may incur in complying with the subpoena. The Commission is authorized to contribute toward the cost of compliance and will make ar-

rangements to do so when these expenses become less speculative." Determination at 4. As to the first statement, it is sufficient to point out that a request for payment before the issuance of the subpoena might have been regarded as premature. In any event, the Petition provides ample notice that Shell now requests such payments for any expenses necessary for responding to the subpoena. As to the second point, the Determination is in error. The Commission cannot require Shell to respond to the subpoena before advance payments are made simply because costs are regarded as "speculative." The courts have held that the standards established for subpoenas under Rule 45(b) of the Federal Rules of Civil Procedures also apply to the Commission's subpoenas. That rule requires "advancement by the person in whose behalf the subpoena is issued of the reasonable costs of reproducing the books, papers, documents, or tangible things" sought in the subpoena. See, *e.g.*, *New Orleans Public Service Commission* v. *Brown*, 509 F.2d 160, 165 (5th Cir. 1975).

VII. THE SUBPOENA VIOLATES THE FEDERAL REPORTS ACT

As to the compliance with the Federal Reports Act issue raised in paragraph 1(i) of the Petition, the determination states that the request for information is not a "form request which is uniformly sent out to all respondents who are the subject of a Commissioner's Charge. Each such request is tailored to the specific respondent and allegations involved in the charge." Determination at 4. The Determination thus suggests that the rearranging of the format and the addition or deletion of certain boilerplate questions provides an exemption from the Federal Reports Act. This position misconstrues the purpose and effect of the Act. In order for Sections 3509 and 3512 of the Act to apply, the request for information, or one substantially similar to it, need only be used for collection of information from ten or more charged parties rather than from "all respondents who are subject to a Commissioner's Charge," as the Determination contends. That there may be occasional changes and rearrangements of the form questions certainly cannot be the basis of a valid exemption from the Act's

requirements.[6] Moreover, the argument at page 6 of the Determination that the Commission is free to seek information already provided by Shell to other government agencies (see paragraph 4 of the Petition) provides a textbook example of the abuses which the Federal Reports Act was enacted to correct.

VIII. THE SUBPOENA SHOULD BE LIMITED TO THE PERIOD FOR WHICH ACTIONABLE TITLE VII VIOLATIONS COULD CONCEIVABLY BE FOUND

Assuming that the Determination's discussion of time limits (at page 5) constitutes an admission that the reference to 1965 was merely an overlooked piece of Commission boilerplate (see sections I and VII, *supra*), it now appears that the subpoena seeks data going back to January 1, 1976.[7] As the Supreme Court has definitively ruled in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), discrimination and allegations of discrimination occurring more than 180 days before the filing of a Title VII charge are relevant, if at all, merely as background information. Where the ostensible purpose of an investigation is to determine "reasonable cause" rather than ultimate liability, such "background information" has no value whatsoever. If reasonable cause cannot be discerned from actions and practices during the liability period, it cannot be supplied from prior occurrences. Accordingly, the scope fo the subpoena should be limited to the appropriate liability peri-

[6] In a similar instance involving "desk audit" questions asked by OFCCP, the Office of Management and Budget directed OFCCP to stop collecting the requested information until approval of the forms had been requested and obtained. *See* BNA Daily Labor Report, March 16, 1979, at A-5–A-8.

[7] This apparent concession is based on a distinction, perceived by the District Director, between the "object" and the "limits" of each request. In this and other instances, the Determination's discussion of the ambiguities contained in the subpoena (see paragraph 1(k) of the Petition) is by no means clear. Shell reiterates that ambiguities remain in the subpoena requests, even with respect to those elucidated in the Determination.

od, 180 days before the date of Commissioner Norton's charge.

RESPECTFULLY SBUMITTED,

/s/ MARTIN SCHNEIDERMAN
MARTIN D. SCHNEIDERMAN
SAMUEL T. PERKINS
MARK B. GOODWIN
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
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Attorneys for Respondents

EXHIBIT M—DETERMINATION OF APPEAL PETITION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20505

Office of the
General Counsel

Charge No. 072800036
Subpoena No. SL-80-35

IN THE MATTER OF:

ELLANOR HOLMES NORTON, CHARGING PARTY,

v.

SHELL OIL COMPANY, RESPONDENT.

ADDRESSEE:
Mr. Roger Rice
P.O. Box 262
Wood River, Illinois 62095

DETERMINATION ON APPEAL PETITION

Respondent-Appellant (hereinafter Respondent) has timely filed an Appeal from a Determination of the Director of the St Louis District Office denying Respondent's Petition to Revoke Subpoena. The requisite number of Commissioners having reviewed the Appeal Petition pursuant to the Commission's Procedural Regulations, 29 C.F.R. 1601.16(b), the Commission hereby denies the Appeal Petition to revoke the subpoena.

As part of its Appeal, Respondent resubmitted and incorporated by reference each of the arguments in its initial Petition. Respondent requested that the General Counsel reexamine the District Director's Determination which denied each of Respondent's arguments. It has been determined that the said Determination completely and accurately disputed Resondent's contentions and set forth applicable statutes, rules and case law. Accordingly, the

grounds set forth in the District Director's Determination are adopted herein in full.

In addition, in eight numbered sections in its Appeal, Respondent seeks to clarify or augment arguments raised earlier in its initial Petition. Sections III and VII of the Appeal neither raise new factual or legal issues nor cite cases not previously considered; accordingly, the grounds set forth in the District Director's Determination with respect to those arguments answer those two sections. With respect to the other six sections, which do raise new factual or legal issues and do cite cases not previously considered, each will be considered in turn below.

1. In Section I Respondent repeats its earlier argument that the Commissioner's charge has been filed without foundation and without a clear statement of the facts constituting the alleged unlawful employment practices. The District Director's Determination adequately responded to Respondent's earlier argument, but in its Appeal Respondent amplifies the earlier arguments by discussing the purpose of the 1972 Amendment to Section 706(b) of Title VII, which requires Commissioner charges to be filed in writing under oath or affirmation. Respondent contends that, by this amendment, Congress intended to hold the Commission to a higher standard for filing a Commissioner charge than it had under the original reasonable cause standard. However, the two cases cited by Respondent[1] merely affirm the language of the amendment that the Commissioner charge be filed "in writing under oath or affirmation." In neither its Appeal nor its initial Petition has Respondent contended that that requirement has not been met; nor can they since the Commissioner charge was "in writing under oath or affirmation." Accordingly, Respondent's argument fails.

2. In Section II Respondent reiterates its argument that it cannot be required to compile data for the Commission. The Director's Determination correctly stated EEOC's po-

[1] *EEOC* v. *Appalachian Power Co.*, 13 FEP Cases 1294 (W.D. Va. 1976), *aff'd* for reasons set forth by District Court, 568 F.2d 354 (4th Cir. 1978); *Stewart* v. *Core Laboratories, Inc.*, 460 F. Supp. 931 (N.D. Texas 1978).

sition on that issue. The two cases[2] in its Appeal which Respondent cites in favor of its argument are outside the Eighth Circuit and are not controlling. Accordingly, EEOC must reject Respondent's argument.

3. In Section IV Respondent amplifies its original argument of burdensomeness by estimating the amount of time it would take to respond to just one of the subpoena specifications. The Director's Determination notes EEOC's concern about the burden on Respondent; but nonetheless, "burdensomeness, expense and inconvenience are inherent in any compulsory process." Obviously such expense has a tendency to be greater in the investigation of a broad scale Commissioner charge than in a simple one-on-one case. The District Director in his Determination has already assured Respondent that EEOC is authorized to contribute toward the costs of compliance, thus to an extent alleviating some of the burden and expense.

4. In Section V Respondent repeats its contention that disclosure of investigatory material to a private contractor is a disclosure to the public and violative of statutory provisions. In support of its argument Respondent cites three cases[3] in which three different circuits have found EEOC's regulations authorizing disclosure of investigative material to Charging Parties as violative of Title VII.

None of the above-cited cases expressly forbids the handling of investigative material by a private contractor performing services for EEOC. Rather, each of the cases, as pointed out by Respondent, specifically deals with nondisclosure of Charging Parties who sought such investigative material for their own private purposes. There being

[2] *Georgia Power Co.* v. *EEOC*, 295 F. Supp. 950 N.D. Ga. 1968), *aff'd*, 412 F.2d 462 (5th Cir. 1969); *Joslin Dry Goods Co.* v. *EEOC*, 336 F. Supp. 941 (D.C. Colo. 1971), *aff'd in part and rev'd in part*, 483 F.2d 178 (10th Cir. 1973).

[3] *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); *Burlington Northern, Inc.* v. *EEOC* 582 F.2d 1097 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *EEOC* v. *Associated Dry Goods Corp.*, 607 F.2d 1075 (4th Cir. 1979), *cert granted*, ____ *U.S.* ____ *(1980)*.

no statutory or case law authority supporting Respondent's argument, the Commission must deny it.

5. In Section VI Respondent again requests advance payment for any expenses necessary for responding to the subpoena. In his Determination, the District Director stated that the "Commission is authorized to contribute toward the costs of compliance and will make arrangements to do so when these expenses become less speculative." Nowhere, in Sections IV and V, or elsewhere in its Appeal, does Respondent itemize its actual expenses. The Commission remains open to working out details of Respondent's expenses.

Further, Respondent relies on Rule 45(b)[4] of the Federal Rules of Civil Procedure in support of its argument that the Commission cannot require Respondent to respond to the subpoena before advance payments are received. Respondent's assertion that Rule 45(b) "requires" advancement ignores the language of the Rule, which clearly gives the court discretion to decide such an issue.

The decision cited by Respondent in support of its erroneous position, *New Orleans Public Service Commission* v. *Brown*, 507 F.2d 160, 165 (5th cir. 1975, does not even deal with the issue of advance payments. Rather, every holding in that decision supports the Commission's position with respect to the validity of this subpoena. Accordingly, the Respondent's argument fails.

6. Finally, Respondent repeats its earlier argument that the subpoena should be limited to the time period for which actionable Title VII violations could concievably be found. In support of its argument, Respondent propounds the theory that background information (i.e., evidence of discrimination before the time limitations of the action), while relevant to a legal action in court, has no value whatsoever in an administrative investigation. Respondent's reasoning

[4] The relevant portion of Rule 45(b) is as follows:

> "[T]he court, upon motion made promptly . . .; may . . . (2) condition denial or the motion upon the advancement by the person in whose behalf of subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things."

is that "If reasonable cause cannot be discerned from actions and practices during the liability period, it cannot be supplied for prior occurrences."

Respondent's argument fails on two grounds. First of all, Respondent's assertion that such background information has no value whatsoever is controverted in Respondent's Appeal by its references to *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 553 (1977), which hold that evidence of discrimination occurring more than 180 days before the filing of a Title VII charge is relevant as background information. Whatever, a court would find relevant, certainly EEOC would also, and this is the basis upon which a request for material in an investigation is determined to be valid or invalid.

Also, in any event it is the Commission, not the party being investigated, that must determine what material is relevant to the investigation and to the finding of reasonable cause. *EEOC* v. *University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Pacific Maritime Association* v. *Quinn*, 491 F.2d 1294 (9th Cir. 1974). Accordingly, Respondent's argument must fail.

DETERMINATION

Respondent's Appeal Petition is hereby denied. The subpoena is modified to the extent that the addressee therein is directed to apear before Terence W. Marlow, of the United States Equal Employment Opportunity Commission at 1601 Olive Street, St. Louis, Missouri 63103, on September 18, 1980 at 10 o'clock a.m. of that day, and at said time and place produce all the documents described in the subpoena.

On Behalf of the Commission

/S/ LEROY D. CLARK
LEROY D. CLARK
General Counsel

Date: AUGUST 9, 19____

COMPLAINT
CIVIL NO. 90-1202C(5)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 80-1202-C(5)

SHELL OIL COMPANY, PLAINTIFF,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

ELEANOR HOLMES NORTON
Chair, United States Equal Employment Opportunity Commission

LEROY CLARK
General Counsel, United States Equal Employment Opportunity Commission,

W. ED MANSFIELD
District Director, St. Louis District Office
United States Equal Employment Opportunity Commission, DEFENDANTS.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a civil action for declaratory and injunctive releif with respect to certain actions of the defendants in connection with a charge against plaintiff Shell Oil Company ("Shell") pursuant to Title VII of the 1964 Civil Rights Act and an investigative subpoena issued subsequent to that charge.

2. Shell asserts that the charge filed against it was initiated without lawful authority and as a result of arbitrary and capricious agency action; the charge does not reasonably afford plaintiff a basis to understand the relevance of the information demanded by the agency. Shell also asserts

that the subsequent investigative subpoena was invalidly issued and is unnecessarily and unreasonably burdensome. The subpoena also contravenes the terms of the Federal Reports Act. In addition, defendants have claimed the authority to disclose data covered by the subpoena to unnamed third parties in direct contravention of Title VII and the Trade Secrets Act. For these reasons, Shell seeks to have the subpoena quashed and the defendants enjoined from their unlawful and arbitrary course of conduct.

JURISDICTION AND VENUE

3. Jurisdiction arises under the Fifth Amendment to the Constitution of the United States; the Declaratory Judgment Act (28 U.S.C. §§ 2201 *et seq.*); the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*); the Federal Reports Act (44 U.S.C. §§ 3501 *et seq.*); the Trade Secrets Act (18 U.S.C. § 1905); and Sections 1331, 1337 and 1651 of Title 28 of the United States Code.

4. The matters in controversy arise under the laws of the United States and exceed the sum of ten thousand dollars, exclusive of interest and costs.

5. This action is properly brought in this Court under the provisions of 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff Shell is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at One Shell Plaza, Houston, Texas. Shell is authorized to do business in the state of Missouri, where this action began with the issuance of a Commissioner's Charge and subsequent subpoena.

7. Defendant Equal Employment Opportunity Commission ("EEOC") is an administrative agency of the United States organized and existing pursuant to Title VII of the Civil Rights act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, with its principal office in Washington, D.C. Defendant Eleanor Holmes Norton is Chair and a Commissioner of EEOC. Defendant Leroy Clark is General Counsel of EEOC. Defendant W. Ed Mansfield is District Director of the St. Louis Missouri, District Office of EEOC. Defend-

ants Norton, Clark, and Mansfield are sued in their official capacities.

NATURE OF THE CONTROVERSY

8. On or about September 27, 1979, defendant Norton initiated a so-called "Commissioner's Charge" against Shell alleging employment discrimination on the basis of race and sex at Shell's refinery in Wood River, Illinois.

9. Defendant Norton's charge purported to be filed pursuant to section 706(b) of Title VII of the 1964 Civil Rights Act ("Title VII"), which requires, *inter alia*, that "the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" and that the charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."

10. Section 706(b) limits the scope of such charges to alleged instances of discrimination occurring within 180 days prior to the filing of the charge. Defendant Norton's charge did not specify the dates of any alleged discriminatory acts or practices nor was there any indication that the charge was timely as to the allegations therein.

11. The EEOC's regulations, 29 C.F.R. § 1601.12(a), provide that a charge should include "a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices ...." Although the regulations, § 1601.12(b), provide that a charge is "sufficient" if the parties are identified and the practices complained of "[are] describe[d] generally" in writing, this latter provision was intended to protect the rights of unsophisticated charging parties.

12. Defendant Norton's charge consists of boiler-plate and conclusory allegations of discrimination against Shell, with no citation of any alleged specific incident or practice of discrimination and no identification of any pertinent date on which any alleged incident of discrimination occurred or any period during which discriminatory policies were in force.

13. At the time defendant Mansfield issued a subpoena based on defendant Norton's charge against Shell, defend-

ants were on notice, in their official capacities, of the following facts:

(a) Within the previous ten years only two charges of employment discrimination on the basis of race or sex had been filed with either the Illinois Fair Employment Practices Commission or the EEOC. Both charges were dismissed.

(b) No such charges at all had been filed within the previous five years.

(c) As of December 31, 1979, the Wood River Refinery employed 1,757 persons, of whom 126 were black and 131 were female. As of that date, therefore, blacks and females constituted 7.2 percent and 7.5 percent respectively of the total work force at the Wood River Refinery.

(d) Blacks and women constitute respectively 4.7 percent and 8.0 percent of the appropriate labor market for the Wood River Refinery.

(e) Of the employees working at the Wood River Refinery as of December 31, 1979 who had been employed by Shell since July 1965, the effective date of Title VII of the Civil Rights Act of 1964, 12.3 percent were black and 9.8 percent were female.

(f) For the period beginning more than two years before the filing of defendant Norton's charge, the hiring rate for blacks and females at the Wood River Refinery significantly exceeded their respective availabilities in the Wood River Refinery labor market. Promotion rates for the same period for blacks and females exceeded both the Wood River Refinery's internal work force representation and the external Wood River Refinery labor market availability figures.

(g) The increases in black and female representation in the Wood River Refinery work force occurred despite the fact that the total number of employees at the refinery declined by 23 percent over the ten years ending December 31, 1979.

14. Upon the filing of defendant Norton's charge, defendant EEOC served Shell with a Request for Information comprising 33 items and numerous sub-items. This Request for Information sought to require Shell to produce business

records and other documents, to make compilations and calculations of data, and to answer detailed interrogatories pertaining to the operation of the Wood River Refinery.

15. Compliance by Shell with EEOC's Request for Information would have been a costly and burdensome procedure that would have interfered with management and operations at Snell's Wood River Refinery.

16. On November 28, 1979, Shell's representatives met with EEOC respresentatives at the St. Louis District Office to ask the basis, if any, upon which defendant Norton's charge had been filed against Shell. The EEOC representatives declined to provide any detailed information or allegations to support the issuance of a commissioner's charge.

17. By letter of March 7, 1980, Shell furnished defendant Mansfield with detailed information, including the facts outlined in Paragraph 13 of this Complaint, showing that Commissioner Norton's charge was wholly unjustified. The letter again requested that defendants provide Shell with detailed information or allegations to support the issuance of defendant Norton's charge and to permit Shell's efficient and economical development of a response to the Request for Information.

18. EEOC responded by letter of April 11, 1980, signed by Ernestine C. Thomas, a subordinate of defendant Mansfield in EEOC's St. Louis Disrict Office. By that letter, EEOC refused to provide Shell with the information it had requested, and instead demanded that Shell provide EEOC with additional information on its employment practices, as detailed in the Request for Information.

19. Shell responded by letter of April 28, 1980. The letter contrasted EEOC's failure to address adequately Shell's inquiries regarding defendants' charge and Request for Information with Shell's record of attempted cooperation in the matter. The letter reiterated several of Shell's concerns, including EEOC's use of a standard form questionnaire not approved by the Office of Management and Budget pursuant to the Federal Reports Act. However, Shell expressed its willingness to discuss the Request for Information further with EEOC.

20. On May 16, 1980, defendant Mansfield caused the service of an administrative Subpoena on Shell. The Subpoena demanded that Shell provide substantially the same records and data as were sought in EEOC's previous Request for Information dated October 26, 1979.

21. On May 23, 1980, Shell timely filed a Petition to Revoke or Modify Subpoena addressed to defendant Mansfield.

22. On June 9, 1980, defendant Mansfield denied Shell's Petition to Revoke or Modify Subpoena.

23. On June 23, 1980, Shell timely filed an Appeal of Petition to Revoke or Modify Subpoena addressed to defendant Clark, with a copy served on defendant Mansfield.

24. On August 27, 1980, on behalf of EEOC, defendant Clark issued a Determination denying Shell's Appeal of Petition to Revoke or Modify Subpoena. Defendant Clark's Determination constituted final agency action with respect to Shell's efforts to obtain releif from EEOC's demands for information and documents.

COUNT I

25. Shell repeats and realleges each and every allegation contained in Paragraphs 1 through 24 of this Complaint with the same force and effect as if fully set forth herein.

26. Defendant Norton filed her charge without any basis in fact for the conclusory allegations made. No specific alleged act or practice of discrimination is described therein, nor is the date of such act or practice given. The charge does not purport to allege any violation of Title VII within the statutory time period set forth in Section 706(b) of the Act.

27. Defendant Norton's charge was initiated, processed, and investigated without compliance, on her part or on the part of EEOC, with the statutory requirements of Section 706 of Title VII, or with the procedural requirements of EEOC's regulations.

28. The initiation of a commissioner's charge by defendant Norton, and the processing and investigation of such a charge by EEOC, constitute arbitrary and capricious agency action, in excess of the EEOC's statutory authority,

without any substantial basis in fact, and a denial of Shell's right to due process of law.

29. Shell has suffered and continues to suffer harm as a result of the unlawful initiation, processing, and investigation of defendant Norton's charge. In addition, because EEOC has refused to provide Shell with any specific allegations in support of the charge, Shell has been and is being denied its due process right to defend itself against the conclusory allegations contained in the charge. Shell has exhausted its administrative remedies and has no adequate remedy at law for the substantial, immediate, and irreparable harm it has suffered and continues to suffer.

COUNT II

30. Shell repeats and realleges each and every allegation contained in paragraphs 1 through 29 of this Complaint with the same force and effect as if fully set forth herein.

31. The administrative Subpoena issued by defendant Mansfield demands that Shell provide numerous documents and other information, including compilations of data, to EEOC. Compliance with the Subpoena would be extremely costly and burdensome to Shell and would substantially interfere with management and operations at its Wood River Refinery.

32. Since the charge filed by defendant Norton contains no specific allegations of discriminatory acts or practices by Shell, defendants have not shown, and cannot show, that the information and documents demanded by the Subpoena relate in any way to subject matter of defendant Norton's charge.

33. The issuance of the Subpoena by defendant Mansfield, the denial of Shell's Petition to Revoke or Modify Subpoena by defendant Mansfield, and the denial of Shell's Appeal of Petition to Revoke or Modify Subpoena by defendant Clark, alone and in combination, constituted arbitrary and capricious agency action, in excess of EEOC's statutory authority, without any substantial basis in fact, and a denial of Shell's right to due process of law.

34. Shell has exhausted its administrative remedies. Unless the Subpoena is quashed, Shell will suffer substantial,

immediate, and irreparable harm and a denial of its due process rights, for which it has no adequate remedy at law.

COUNT III

35. Shell repeats and realleges each and every allegation contained in paragraphs 1-34 of this Complaint with the same force and effect as if fully set forth herein.

36. The Administrative Subpoena issued by defendant Mansfield demands that Shell provide data going back to January 1, 1976.

37. In an investigation by EEOC pursuant to Title VII, discrimination and allegations thereof occurring more than 180 days before the filing of a charge are relevant, if at all, merely as background information.

38. because the conclusory charge filed by defendant Norton contains no specific allegation that Shell committed discriminatory acts or practices within (or before) the 180-day period prior to filing of the charge, the information sought in the Subpoena concerning events occurring more than 180 days prior to the filing is not relevant.

39. Unless the Subpoena is quashed, Shell will suffer irreparable harm as a result of EEOC's demand that it provide information going back to January 1, 1976. If Shell must provide this information to EEOC, it will be unable to protect itself against defendant Norton's charge without incurring unwarranted costs in time, labor and money. Shell has no adequate remedly at law to prevent this threatened harm.

COUNT IV

40. Shell repeats and realleges each and every allegation contained in paragraphs 1 through 39 of this Complaint with the same force and effect as if fully set forth herein.

41. EEOC is a Federal Agency as defined by the Federal Reports act, 44 U.S.C. § 3502.

42. On information and belief, plaintiff alleges that EEOC has requested from 10 or more persons, including Shell, information identical or substantially identical to that sought by it in the Request for Information dated October 26, 1979, and again sought in the Subpoena issued by defendant Mansfield on May 15, 1980.

43. On information and belief, plaintiff alleges that EEOC has failed to submit to the Director of the Office of Management and Budget ("OMB") its Request for Information form dated October 26, 1979 or a substantially identical form, for the purpose of obtaining a statement from the director that he does not disapprove of the proposed collection of information. The failure by EEOC to obtain such a document from the Director of OMB is a violation of Section 3509 of the Federal Reports Act, as amended, 44 U.S.C. § 3509.

44. Shell has suffered harm and continues to suffer harm as a result of EEOC's failure to comply with Section 3509 of the Federal Reports Act, and has been subject to arbitrary, capricious, and unlawful Agency action as a result thereof. Because defendants have failed to comply with Section 3512 of the Federal Reports act, Shell is unable to protect itself against defendant Norton's charge without incurring excessive costs in time, labor, and money in order to respond to defendants' burdensome demands for information. Shell has no adequate remedy at law for the harm it has suffered and continues to suffer as a result of defendants' actions.

COUNT V

45. Shell repeats and realleges each and every allegation contained in Paragraphs 1 through 44 of this Complaint with the same force and effect as if fully set forth herein.

46. EEOC is an independent federal regulatory agency as defined by the Federal Reports Act, 44 U.S.C. § 3502.

47. Defendants have failed to submit to the Comptroller General of the United States their Request for Information form dated October 26, 1979, or a substantially identical form, for the Comptroller General's approval.

48. Defendants' failure to obtain such approval from the Comptroller General is a violation of Section 3512 of the Federal Reports Act.

49. Shell has suffered harm and continues to suffer harm as a result of defendants' failure to comply with Section 3512 of the Federal Reports Act and has been subject to arbitrary, capricious, and unlawful agency action as a result

thereof. Because defendants have failed to comply with Section 3512 of the Federal Reports act, Shell is unable to protect itself against defendant Norton's charge without incurring excessive costs in time, labor, and money in order to respond to defendants' burdensome demands for information. Shell has no adequate remedy at law for the harm it has suffered and continues to suffer as a result of defendants' actions.

COUNT VI

50. Shell repeats and realleges each and every allegation contained in Paragraphs 1 through 49 of this Complaint with the same force and effect as if fully set forth herein.

51. EEOC frequently retains outside consultants to review investigatory materials, particularly computer data. In so doing, EEOC provides such consultants with a charged employer's company documents and computer records.

52. This practice violates Sections 706(b) and 709(e) of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e), and EEOC's regulations pursuant thereto. In addition it violates the Trade Secrets Act, 18 U.S.C. § 1905.

53. EEOC has refused to give Shell any assurance that it will not provide the information demanded from Shell to outside consultants, and has in fact asserted a right to do so.

54. Shell will suffer serious and irreparable harm by reason of the practices described in this Count unless the Subpoena issued by defendant Mansfield is quashed. If Shell were to provide documents and information to defendants pursuant to the Subpoena, and such information were subsequently revealed by EEOC to outside consultants, there is a substantial danger that Shell's competitors and the general public would be given access to highly confidential business information and personnel data which could be utilized to damage Shell's business. Shell has no adequate remedy at law to prevent this threatened harm.

COUNT VII

55. Shell repeats and realleges each and every allegation contained in Paragraphs 1 through 54 of this Complaint with the same force and effect as if fully set forth herein.

56. The Subpoena issued by defendant Mansfield requires Shell to provide compilations or summaries to the extent that they "can be produced through computer or other mechanical sources available to the respondent to produce such materials." Thus, the Subpoena requires Shell to utilize its computer resources to create documents and summaries.

57. Creation of documents and summaries by use of its computer resources constitutes a time-consuming and costly burden upon Shell by displacing other essential projects requiring use of those same resources. The requirement that Shell undertake this burden for defendants is inconsistent with Title VII and with the subpoena authority to EEOC under Title VII.

58. Unless the Subpoena is quashed, Shell will suffer irreparable harm as a result of the demand that it compile and produce new data and information in response to the subpoena. If Shell must provide compilations and summaries to EEOC in order to comply with its subpoena, Shell will be unable to protect itself against defendant Norton's charge without incurring excessive costs in time, labor, and money in order to respond to the Subpoena. Shell has no adequate remedy at law to prevent this threatened harm.

COUNT VIII

59. Shell repeats and realleges each and every allegation contained in paragraphs 1 through 58 of this Complaint with the same force and effect as if fully set forth herein.

60. The Subpoena issued by defendant Mansfield seeks information regarding Shell's computer files and computer capability. This information is apparently sought as background information on which to base a further demand by defendants that Shell compile information for EEOC by use of its computer capability.

61. Requests for information designed to learn about computer capability so that EEOC can demand that compilations and summaries be provided by use of that computer

capability are inconsistent with Title VII of the subpoena authority of EEOC under Title VII.

62. Unless the Subpoena is quashed, Shell will suffer irreparable harm as a result of the demand that it provide information as to its computer capabilities. If Shell must provide information regarding its computer capability in order to comply with EEOC's subpoena, it will be unable to protect itself against defendant Norton's charge without incurring excessive costs in time, labor and money in order to respond to defendants' further requests for compilations and summaries. Shell has no adequate remedy at law to prevent this threatened harm.

WHEREFORE, Shell prays that this Court:

1. Declare that defendant Norton's charge has been filed, processed, and investigated in an arbitrary and capricious manner, without statutory authority or any substantial basis in fact, and in derogation of Shell's due process rights.

2. Declare that the issuance of the Subpoena by defendant Mansfield, the denial of Shell's Petition to Revoke or Modify Subpoena by defendant Mansfield, and the denial of Shell's Appeal of Petition to Revoke or Modify Subpoena by defendant Clark, alone and in combination, constituted arbitrary and capricious agency action, in excess of EEOC's statutory authority, without any substantial basis in fact, and in derogation of Shell's due process rights.

3. Declare that defendants have no authority to require Shell to provide information concerning events occurring more than 180 days prior to the filing of defendant Norton's charge.

4. Declare that defendants violated Section 3509 of the Federal Reports Act because they failed to submit the Request for Information form upon which the Subpoena was based to the Director of OMB for his approval.

5. Declare that defendants violated Section 3512 of the Federal Reports Act because they failed to submit the Request for Information form upon which the Subpoena was based to the Comptroller General of the United States for his approval.

6. Declare that EEOC's practice of providing materials obtained by it during investigations to outside contractors violates Sections 706(b) and 709(e) of Title VII and also violates the Trade Secrets Act.

7. Declare that defendants lack authority by statute or regulation to require Shell to provide computer compilations and summaries, or information concerning its computer capabilities, in response to defendants' Subpoena.

8. Enjoin defendants permanently from each of the following actions and courses of conduct:

(a) Further processing or investigation of defendant Norton's charge;

(b) Further enforcement of the Subpoena issued by defendant Mansfield;

(c) Further enforcement of the Subpoena issued by defendant Mansfield as to all items demanding the provision of information concerning events occurring more than 180 days prior to the filing of defendant Norton's charge;

(d) Continuing violations of Section 3509 and 3512 of the Federal Reports Act;

(e) Continuing violations of Section 706(b) and 709(e) of Title VII, end of the Trade Secrets Act;

(f) Further enforcement of the Subpoena issued by defendant Mansfield as to all items demanding computer compilations or summaries, or descriptions of Shell's computer capabilities;

9. Grant Shell reasonable attorneys' fees and litigation costs incurred in this action, and such other and further relief as appears to this Court to be just and proper.

Respectfully submitted,

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Dated: SEPTEMBER 18, 1980

In the Supreme Court of the United States

No. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER,

v.

SHELL OIL COMPANY

ORDER ALLOWING CERTIORARI. Filed February 22, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Supreme Court, U.S.
FILED
JAN 19 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

BRIEF OF SHELL OIL COMPANY IN RESPONSE TO THE PETITION OF THE SOLICITOR GENERAL FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission can satisfy the oath and notice requirements regarding the "circumstances" element of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of any specific factual averment

2. Whether a Commissioner of the Equal Employment Opportunity Commission can select a respondent employer as the target of a charge of discrimination under Section 706(b) on an audit basis.

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OCTOBER TERM, 1982

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SHELL OIL COMPANY,
Respondent.

BRIEF OF SHELL OIL COMPANY IN RESPONSE TO THE PETITION OF THE SOLICITOR GENERAL FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chair and a Commissioner of the Equal Employment Opportunity Commission ("EEOC" or "the Commission"), filed a charge against Shell Oil Company ("Shell"),[1] alleging "across-the-board" discrimination at Shell's Wood

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1. The parent companies and current affiliates of Shell are set out in Appendix A.

River, Illinois refinery.[2] The charge consisted of boilerplate and conclusory allegations of discrimination. It did not allege specific discriminatory practices or incidents; nor did it identify either the period during which alleged discriminatory practices were in effect or the date of any alleged incident of discrimination.

Ms. Norton's charge was not the result of any individual charges filed against Shell, nor of allegations by persons wishing to remain anonymous but, instead, was the result of the activities of the Commission's Office of Systemic Programs ("OSP"). 676 F.2d 322, 325, n.5. *See* Petition at 6. OSP was established in late 1977 for the purpose of developing and initiating EEOC's commissioner's charges alleging systemic discrimination. It began to function in early 1979, at which time OSP personnel were added at EEOC headquarters and district offices and a goal was set of filing approximately 130 systemic charges by the end of 1979. The OSP program does not depend on specific evidence of discrimination in selecting employers as targets of commissioner's charges. For example, the guidelines used by OSP call for the selection of employers who, by reason of expansion or turnover, "are likely to have substantial numbers of employment opportunities and . . . whose practices *may* not provide available minorities and women with fair access to these opportunities." Petition at 41a.

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2. The charge is set forth as Appendix F, pp. 44a-46a, to the Petition for a Writ of Certiorari ("Petition") in this case. Ms. Norton's sworn statement of cause to believe the allegations of the charge is dated September 27, 1979; however, the date of filing was not a matter of record below until the EEOC filed its Petition for Rehearing. Because Shell was not served with notice of the charge until October 26, 1979, EEOC failed to provide notice within the ten day period required by Section 706(b). This fact provides an independent ground for holding the charge invalid.

EEOC served Shell with a copy of the charge and a request for information on October 26, 1979. In response to the request for information, Shell pointed out the following facts pertinent to the charge and the request:

> (a) Within the five years prior to the filing of the commissioner's charge, no charges of employment discrimination on the basis of race or sex had been filed against Shell's Wood River, Illinois refinery.
>
> (b) Within the ten years prior to the commissioner's charge, only two charges of race or sex discrimination had been filed with either the Illinois Fair Employment Practices Commission or the EEOC. Both charges were dismissed.[3]
>
> (c) As of December 31, 1979, the Wood River Refinery employed 1,757 persons, of whom 126 were black and 131 were female. Thus, as of that date, blacks and females constituted 7.2% and 7.5%, respectively, of the total work force at the Wood River Refinery.
>
> (d) As of December 31, 1979, blacks and females constituted respectively 4.7% and 8.0% of the ap-

---

3. Over the years 1973-1975, the Department of Interior/Office of Equal Opportunity, the predecessor of the Office of Federal Contract Compliance Programs, conducted a compliance review of Shell's Wood River facility. The review included a desk audit and an on-site investigation. Upon completion of the compliance review, the agency found Shell to be in compliance with Executive Order 11246, which is similar in purpose to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") and which contains not only an anti-discrimination clause but also an affirmative action obligation.

propriate labor market for the Wood River Refinery.[4]

(e) Of the employees at the Wood River Refinery on December 31, 1979, who had been hired by Shell since July 2, 1965 (the effective date of Title VII), 12.3% were black and 9.8% were female.

(f) For the period beginning more than two years before the filing of the commissioner's charge, the hiring rate for blacks and females at the Wood River Refinery significantly exceeded their respective availabilities in the Wood River Refinery labor market. During this same period, promotions of blacks and females at the Wood River Refinery exceeded both the internal work force representation and the external Wood River Refinery labor market availability figures.

(g) The increases in black and female representation in the Wood River Refinery work force occurred despite the fact that the total number of employees at the Refinery declined by 23% over the ten years ending December 31, 1979.

In connection with this presentation to EEOC, Shell sought from EEOC specific information supporting the issuance of Chair Norton's charge so that the company

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4. During the compliance review mentioned in Footnote 3, *supra*, Shell and the reviewing agency reached agreement on the appropriate method for determining "availability" and the appropriate "local labor market" for the Wood River facility. Shell's data in items (c) through (f) were based on this agreed-upon method.

could understand the underlying bases of the charge. With this understanding, Shell could then develop an efficient and economical response to the Commission's request for information. EEOC refused to provide any further information and eventually issued an administrative subpoena to Shell for the documents and data sought in its previous request.

Following its exhaustion of administrative remedies, Shell filed a suit for declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. Shell contended that the charge was invalid as an unauthorized effort by EEOC to conduct an audit of Shell's activities, rather than to investigate any ostensible discrimination. Shell alleged that the charge had failed to provide Shell with adequate notice of the date and circumstances of the alleged discrimination as required by the statute. Based in part on the aforementioned employment data, Shell also questioned EEOC's compliance with the oath requirement and thus the validity of the charge. In support of its complaint Shell sought limited discovery directed to the issue of whether EEOC was conducting an unauthorized audit.

On Shell's appeal from the district court's order denying Shell's discovery against EEOC and enforcing EEOC's subpoena against Shell, the Eighth Circuit held that the commissioner's charge in issue failed to provide a factual basis for the Commissioner's belief and adequate notice of the date and circumstances required by Section 706(b). 676 F.2d at 325-26. The court of appeals remanded the case to the district court to give EEOC an opportunity

to amend the charge to comply with the requirements of Section 706(b). 676 F.2d at 326.[5]

The court of appeals noted that the parties did not dispute that providing the name and address of the plant at which the alleged practices occurred satisfied the "place" requirement. 676 F.2d at 325, n.4. However, following earlier decisions in *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1337-38 (9th Cir. 1980), and *EEOC v. K-Mart Corp.*, 526 F. Supp. 121, 125 (E.D. Mich. 1981), *vacated on other grounds*, ____F.2d____ (6th Cir. December 8, 1982), the Eighth Circuit held that EEOC's use of July 2, 1965—the effective date of Title VII—as the "date" element in the charge did not "give notice to the employer of the parameters of the investigation." 676 F.2d at 325.[6] As to the "circumstances" element, the court of appeals went on to hold:

> . . . [S]ection 706(b) requires a statement of the circumstances of the alleged unlawful practices. As with the date requirement, we read this to require the statement of circumstances to be supported by some factual or statistical basis.

676 F.2d at 325-26.

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5. Shell contends that an EEOC commissioner's charge cannot be amended once the Commissioner has left office. Neither party briefed this issue to the district court or the court of appeals. However, in its Petition for Rehearing EEOC stated, "It is far from clear whether Title VII authorized technical amendment of a former commissioner's charge by either the former commissioner or by a sitting commissioner." Petition for Rehearing at 15.

6. On January 16, 1981, after the decision in *Dean Witter, supra*, Ms. Norton amended her charge against Shell to allege that she had "reason to believe that the named employer [Shell] had engaged in the identified unlawful employment practices from at least July 2, 1965 until the present." *See* Petition at 47a.

The words "or statistical" in the passage quoted above were added by the Eighth Circuit among its modifications of the opinion after consideration of EEOC's Petition for Rehearing. In that Petition for Rehearing, EEOC claimed *for the first time* that Ms. Norton's charge against Shell was based on statistical information and not on any individual complaint or charge of discrimination. In light of EEOC's Petition for Rehearing—*to which Shell was not permitted to respond*—the Eighth Circuit modified its opinion to imply that a commissioner's charge could be based on statistics developed by EEOC itself. However, the court of appeals held that "the basic information that the charge is based on statistical data and the general nature of that data, including dates, should be disclosed in the charge." 676 F.2d at 325-26, n.5.

Subsequent to the filing of the EEOC's Petition, the Sixth Circuit issued an opinion in *EEOC v. K-Mart Corp.*, Nos. 81-1722, 82-1909 (6th Cir. December 8, 1982) in which it stated:

> We do not agree, however, with the Eighth Circuit's holding in *Shell Oil* that section 706(b) requires "some basis in fact." That holding is contrary to well-established law. In subpoena enforcement proceedings, the EEOC usually does not have to prove probable cause or reasonable cause to believe that a charge of discrimination is true. *See, e.g., EEOC v. Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977); *EEOC v. South Carolina National Bank*, 562 F.2d 329 (4th Cir. 1977); *EEOC v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Graniteville v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971). A charge of discrimination merely allows the EEOC to begin an investigation.

> The purpose of that investigation, however, is to determine whether probable cause or reasonable cause to bring a discrimination charge exists. *See, e.g., EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981); *Chrysler Corp.*, 567 F.2d at 755; *Graniteville*, 438 F.2d at 36.

Id., slip opinion at 15, n.7. This language is dicta. The sufficiency of the charge in *K-Mart* was not in issue and, therefore, this point was neither briefed nor argued. Although the language in *K-Mart* concerning the sufficiency of a charge is dicta, it is likely that all federal district courts in the Sixth Circuit will be inclined to give the dicta considerable weight. Moreover, such dicta creates a potential conflict among the circuits concerning the statutory requirements of oath and adequate notice.

SUMMARY OF ARGUMENT

1. The Eighth Circuit decided in this case that the clear statutory directive of Section 706(b) requires EEOC to provide a respondent employer with adequate notice of the circumstances upon which a commissioner's charge is based. The court of appeals did not require the Commission to establish "probable cause," as the Sixth Circuit contended in *K-Mart;* nor did the Eighth Circuit impose "technical" or "hypertechnical" pleading requirements, as the *Dean Witter* court feared. It simply provided that the charge must state the facts which the Commissioner relied upon for filing the charge.

Ordinarily, such a decision would not merit review on a writ of certiorari. However, this case arises in the context of a newly-established EEOC program of auditing large employers. Three circuit court decisions have ad-

dressed the adequacy of notice provided by the Commission in issuing these charges. All three have agreed that the "date" requirement of Section 706(b) must be specifically addressed in the notice. The Eighth Circuit, in this case, has also held that the "circumstances" requirement must be similarly addressed. The Ninth Circuit, in *Dean Witter*, and the Sixth Circuit, in *K-Mart* (dicta), have disagreed. These pronouncements represent at least a potential divergence among circuits. Accordingly, Shell acquiesces in the Petition for Certiorari for the purpose of determining whether the oath and notice requirements regarding the "circumstances" element of Section 706(b) can be satisfied in the absence of any specific factual averment. In considering these requirements, this Court should also clarify the directive of the court of appeals below with respect to the extent to which the source and use of statistical data must be set forth in the charge or notice. This Court should also consider whether discovery of the bases for a charge may be permitted where the validity of the charge is in question.

2. If the Petition is granted, this Court should also consider, and decide, whether EEOC is authorized to conduct investigative audits. In this respect, Shell contends that, under Title VII, EEOC's authority to investigate is far more limited than the authority vested in other federal agencies.

3. The remaining arguments advanced by the Solicitor to justify the grant of a writ are without merit:

(a) Other than the limited divergence between this case, on the one hand, and the *K-Mart* and *Dean Witter* cases on the other, the remaining cases cited by the Solicitor are distinguishable.

(b) Section 706(b), rather than providing *carte blanche* to the Commission to launch investigations, provides EEOC authority to investigate only where there is a valid charge. Section 706(b) establishes specific requirements for a sufficient and valid charge which the Commission may not ignore. Nor may the Commission override the statutory safeguards through its own regulations or interpretations of the statute.

(c) The Solicitor's argument that EEOC has sole responsibility for determining the sufficiency of a charge is incorrect. Where the EEOC seeks enforcement of a subpoena and the respondent challenges the sufficiency or validity of the charge upon which the subpoena is based, a federal court has the responsibility for determining whether a charge meets the statutory requirements.

(d) The Eighth Circuit's decision did not impose a "pleading requirement" but merely gave effect to the language of the statute. Its decision is consistent with the 1972 amendments to Title VII.

(e) The Solicitor's belated attempt to inject the *Socal* decision into this case must be rejected. In all the subpoena enforcement cases cited by the EEOC below and by the Solicitor here, not a single one suggests that the subpoenaed party is precluded from making the very kinds of arguments that Shell made here as to the legal authority of the agency to issue the subpoena and the relevance of the materials sought. In addition, the Solicitor's attempt to equate Federal Trade Commission administrative complaints with the Title VII charge requirement at issue here misses the mark.

ARGUMENT

I. Review By This Court Is Merited In Order To Clarify The Oath And Notice Requirements Relating To The Circumstances Element Of Section 706(b)

In the decision below, the Eighth Circuit held that the charge in issue had failed to provide adequate notice of the "date" and "circumstances" as required by Section 706(b) of Title VII. The court of appeals stated that a respondent employer must have notice of the "approximate dates of the unlawful practices" alleged, including an "approximate beginning date." 676 F.2d at 325. Use of the effective date of Title VII would not satisfy the requirement of providing "notice to the employer of the parameters of the investigation." 676 F.2d at 325. In addition, the notice must provide "some factual or statistical basis for the charge. 676 F.2d at 326. If the charge is based on statistical data, "the general nature of that data, including dates, should be disclosed in the charge." 676 F.2d at 326, n.5.

This case would not ordinarily be suitable for review by this Court. However, as noted above, the case arises in the context of the recently instituted systemic program under which EEOC generates commissioner's charges against employers based on its own studies of factors (such as its own projected availability of future vacancies) which may be wholly unrelated to the existence of any discriminatory employment practices. The question of the adequacy of such charges is likely to recur. If the Court accepts this case for review, it can provide guidance as

to the oath and notice requirements of Section 706(b) which may obviate much future litigation.

In addition, there is a disparity between the Eighth Circuit's holding in this case and the positions taken by two other circuits concerning the "circumstances" requirement of Section 706(b). The courts in the *Dean Witter* and *K-Mart* cases both held, as did the court of appeals below, that the "date" requirement of Section 706 requires the Commission to disclose the dates of the alleged discriminatory practices.[7] However, the *Dean Witter* and *K-Mart* courts failed to recognize that requiring a specific "date" alone gives little notice without a statement of the specific incidents or employment practices alleged to be discriminatory. For that reason, both courts mistakenly rejected the position adopted by the Eighth Circuit, that there must be at least a minimum statement of the factual basis of the charge to satisfy the "circumstances" requirement.

The recent *K-Mart* decision, which criticizes in dicta the Eighth Circuit's decision here, mischaracterizes it as one which requires the EEOC "to prove probable cause."

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7. *EEOC v. Dean Witter Co., Inc., supra*, at 1338 (9th Cir. 1980); *EEOC v. K-Mart Corp., supra*, slip op. at 15. The Solicitor argued that the use of the effective date of Title VII (July 2, 1965) is not unreasonable in a charge of systemic discrimination and therefore can, in such charges, satisfy the standard set by the *Dean Witter* court. Petition at 9. The Ninth Circuit in *Dean Witter*, the Eighth Circuit in *Shell*, and the Sixth Circuit in *K-Mart*, however, have held that a good faith estimate of the dates of alleged discrimination is necessary in order to provide the district court, the respondent, and the agency itself an "objective basis to determine the temporal scope of the investigation." *K-Mart*, slip op. at 15. Among other considerations the scope of the investigation defines the extent of relevant and material evidence to which EEOC may gain access by a subpoena. The boilerplate use of the effective date of Title VII in every case (*see K-Mart*, slip op. at 18) cannot satisfy that requirement.

Slip op. at 15, n.7. Similarly, the earlier *Dean Witter* decision rejects the notion of a "pleading" requirement. 643 F.2d at 1338. These concerns fail to recognize that the purpose behind an adequate notice requirement is to assure the statutory requirements for a valid charge are met and that the charge is not an abuse of governmental authority.

The Sixth and Ninth Circuits appear to believe that a requirement of a factual basis of a charge will limit EEOC's ability to conduct an investigation by locking it into a specific set of allegations at the outset. Such a fear is groundless. It is well-established in Title VII law that the EEOC may pursue the investigation and conciliation of any matter reasonably arising out of its investigation of the original charge. *EEOC v. General Electric Co.*, 532 F.2d 359, 366 (4th Cir. 1976); *EEOC v. E.I. du-pont de Nemours & Co.*, 373 F. Supp. 1321, 1335 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). The Eighth Circuit's construction of the "circumstances" requirement would in no way limit the Commission's ability to subpoena significant information as new subjects of investigation arose. Rather, like the date requirement, it provides a basis for a court to determine the sufficiency and validity of a charge in the course of determining the relevance and materiality of a subpoena based on the charge.

Given the language of the recent *K-Mart* decision and the potential for some divergence among the circuits with respect to the "circumstances" requirement of Section 706(b), Shell acquiesces in the Petition for Certiorari insofar as it seeks review of the holding below with

respect to that requirement. No such divergence presently exists with respect to the "date" requirement and Shell accordingly opposes review with respect to that issue.

In adition to resolving the question of whether the "circumstances" of alleged discrimination must be set forth in a commissioner's charge, this Court should also clarify the notice to be provided if statistical data have been used to support a charge. After consideration of EEOC's Petition for Rehearing, the Eighth Circuit modified its opinion to address the EEOC's contention that many commissioner's charges were based on statistical analysis performed by the Commission. The court of appeals reiterated that the basis of the charge must still be set forth, but did not provide guidance as to the level of detail that must be provided.[8] If this Court grants the Petition for Certiorari, it should address this point.

The use and utility of statistics in Title VII cases varies widely, so if a rule can be stated, it must be stated in

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8. EEOC appears already to be trying to evade the purpose of those standards by a superficial compliance. A prime example is EEOC's recent amendment to a previously filed charge against another company to cure the possible deficiencies of the original charge in light of the Eighth Circuit's decision in *Shell*. The original charge was similar in its general and conclusory nature to that filed against Shell. The commissioner's amendment merely added the following:

> 1. Information regarding the employer and other relevant information were reviewed applying the approved Commission standards for the selection of subjects for systemic discrimination proceedings.
>
> 2. Statistical data contained in the employer's EEO-1 reports available for periods since at least 1973 when compared to measures of availability in the relevant labor market area indicate a continuing pattern of unlawful employment practices against blacks, Hispanics, and women as cited in this charge.

Such an amendment provides no guidance to the respondent or a court reviewing the validity of a charge or the scope of relevance and materiality of a subpoena.

general terms. To give fair notice to the respondent employer and to prevent abuse of authority, the following elements appear to be minimally necessary: (a) the source(s) of the statistics, (b) the date(s) of the statistics, (c) identification of the labor market used to determine the availability data and the source(s) of that data,[9] and (d) how the statistics have been analyzed to lead to the conclusion that the charged party may have violated and/or be violating Title VII.

Such a requirement would work no burden on the Commission, which will have already performed the analysis. Indeed, the Commission has *sua sponte* provided the same or similar data in the past. *New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160, 163 (5th Cir. 1975). Nor will it be necessary to disclose proprietary data provided by other employers, except in rare cases as to which disclosure safeguards can be fashioned.[10]

Requiring the minimum disclosure outlined above in cases where a commissioner's charge is supported by statistics should, however, provide the statutorily required notice to the respondent. It will also enable a reviewing court to determine the statutory validity of a charge as well as whether a subsequent subpoena issued by the Commission seeks information which is relevant and material.

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9. The general description "availability in the relevant labor market area" used in a recent amendment to a commissioner's charge (*see* n. 8 *supra*) is useless without a specification of the labor market used by the Commission as well as the date and source of statistics about the labor market.

10. The Eighth Circuit provided for similar safeguards in the case of charges based on complaints of individuals wishing to remain anonymous. 676 F.2d at 326.

II. If The Court Grants The Petition, It Should Also Consider Whether EEOC Has Authority To Issue Commissioner's Charges As A Device For Auditing Employers

Shell argued below that the selection of its Wood River Refinery as the target of a commissioner's charge represented application by EEOC of an audit approach not authorized by Title VII. Although the court of appeals indirectly provided some safeguards against the use of audit techniques by requiring EEOC to articulate the factual basis for its charge, it did not address the issue.

EEOC belatedly asserted in its Petition for Rehearing below that Chair Norton's charge was based on unspecified statistical studies. However, it did not reveal what those studies were or how they relate—if at all—to Shell's actual employment practices. As set forth earlier, availability data developed using the method specifically approved by the federal compliance review agency show that Shell's representation, rates of hiring, and rates of advancement for blacks and women were at or above availability levels.[11] For those reasons, it appears likely that the Commission's alleged "statistics" would not have justified a charge and that the charge was based on factors that were not related to Shell's employment practices.

From EEOC's perspective, the refinery was a large facility, in what was then regarded as a flourishing industry, and was located in a district in which it was neces-

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11. *See* 3-4 *supra*. The broad-brush approach of Ms. Norton's charge casts doubt on whether it could have been filed in good faith. For example, Shell is unaware of any statistics that would bear on Shell's testing practices, much less provide the basis for a charge. It seems that "testing" has been thrown into the charge simply to complete a litany.

sary to bring a charge.[12] If these external factors accounted for the charge, then the charge constituted an attempt to conduct a full-scale fishing expedition. Shell submits such an action is beyond a Commissioner's statutory authority and is an abuse of governmental power.

Shell contends that EEOC's authorized activities are carefully defined and circumscribed by Title VII and do not include audit investigations.[13] EEOC was created to investigate and conciliate alleged discrimination brought by and on behalf of employees, not to review employers *ad libitum* for the purpose of attempting to discover a claim. For that reason, Congress provided that a charge —"including the date, place and circumstances of the [alleged] unlawful employment practice"—was an essen-

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12. Since Shell has never been granted discovery, it may only speculate as to the reason for the charge. One goal of the OSP was to generate a number of systemic charges from each EEOC district office. To this end, EEOC had assigned personnel and equipment to its St. Louis district office. Under these conditions, it was predictable that an employer would be selected as a target by the district office. Likewise, in order to justify the resources expended, the facility targeted would have to be relatively large. Finally, in order to gain leverage to advance the employment of women and minorities, the district office would seek a facility perceived to operate in a flourishing economic sector. Compared to these concerns, Shell's record of non-discriminatory employment practices (as evidenced by the employment data and a remarkable absence of charges, *see* 3-4 *supra*) apparently was unimportant to OSP.

13. Shell does not contend that EEOC may not consider employment statistics or extraneous factors, such as the size of a respondent's workforce, in deciding how to allocate its investigative resources among respondents, or even in selecting one among several possible employers as the target of a commissioner's charge. However, such external factors must supplement an existing factual basis for a charge of discrimination. They cannot be the predominant reason for a charge, nor can they provide a sufficient factual basis in and of themselves.

tial prerequisite to Commission investigations.[14] The principal legislative spokesmen for Title VII were careful to emphasize the limited nature of EEOC's authority:

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the *Commission's investigatory power is significantly narrower than that of the Federal Trade Commission*, 15 U.S.C. 43, 46, *or of the Wage and Hour Administrator*, 29 U.S.C. 211, *who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing.*

Interpretative Memorandum on Title VII of Senators Clark and Case, Legislative History of Title VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W. S. Hein & Co.) at 3045 (emphasis added).[15]

As stated above, the EEOC, like the NLRB, is not an audit agency but is required to respond to actual claims of discrimination.[16] If it grants certiorari in this case, this Court should clarify that EEOC is not authorized to use a commissioner's charge to initiate an audit. In particular, present OSP criteria alone do not support a good faith

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14. Section 706(b). In this respect, EEOC functions in a manner similar to the National Labor Relations Board ("NLRB"). The NLRB also has no audit authority, but is authorized to conduct an investigation only when an individual charges that an unfair labor practice has occurred. 29 U.S.C. §§ 160(b), 161.

15. *See Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 38.

16. Unlike the National Labor Relations Act ("NLRA"), Title VII permits the Commissioners of EEOC to file a charge. However, a commissioner's charge must, nonetheless, meet the oath and notice requirements of Section 706(b).

belief that a targeted employer is engaging in discriminatory employment practices. Shell contends that the limitation of EEOC's investigative activities to its statutorily authorized functions and allowance of discovery to employers where the validity of a charge is in question will largely prevent the need to litigate the adequacy of future commissioner's charges.

III. The Remaining Arguments Proffered By The Solicitor In Support Of His Petition Are Without Merit

A. The cases cited by the Solicitor to show inconsistency among the circuits are distinguishable

As Shell has stated above, there is a limited disparity between the Eighth Circuit's decision in this case and those of two other courts of appeals with respect to the "circumstances" requirement of Section 706(b).[17] In light of that disparity, review by this Court is warranted to clarify the oath and notice requirements relating to the "circumstances" element of Section 706(b).

The Solicitor attempted to show an inconsistency between the Eighth Circuit's decision and cases decided by "at least" six other circuits.[18] Of the cases cited by the Solicitor, the following involved commissioner's charges which were filed prior to the effective date of the 1972 amendments to Title VII:[19]

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17. *See* 12-14 *supra*.

18. Petition at 9-14. In addition, the Solicitor attempted to argue an inconsistency with respect to the interpretation of the "date" requirement by the Ninth Circuit as compared to the Eighth Circuit. As shown at n.7 *supra*, this argument is incorrect.

19. Public Law 92-261, March 24, 1972.

> *New Orleans Public Service, Inc. v. Brown, supra; Sparton Southwest, Inc. v. EEOC*, 461 F.2d 1055 (10th Cir. 1972) (*en banc*); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.), *cert. den.*, 400 U.S. 942 (1970).

On the bases of the facts and applicable law, these cases are distinguishable from the instant case.[20] None of these cases reflects the total absence of an individual charge such as exists in the instant case. Each of these cases predates not only the establishment of the audit techniques of EEOC's systemic targeting program but also the 1972 amendments to Title VII.

Prior to the effective date of the 1972 amendments, Section 706(a) of Title VII provided:

> Whenever . . . a written charge has been filed by a member of the Commission where he has *reasonable cause to believe* a violation of this title has occurred (and such charge sets forth the facts upon

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20. The charge in *New Orleans Public Service, Inc. v. Brown* was based on discrimination charges by no fewer than six individuals. Moreover, parts of the charge were bolstered by explicit statistical data set forth in the body of the charge itself. In *Sparton Southwest, Inc. v. EEOC*, the charge was limited to three items: failure to recruit and hire minorities, restriction of occupational categories to exclude minorities, and maintenance of separate job classifications based on sex. In *General Employment Enterprises, Inc. v. EEOC*, the charge was limited to refusal to hire Negroes and Jewish people. In *Bowaters Southern Paper Corp. v. EEOC*, only three violations were charged: maintenance of racially restricted job classifications, discriminatory use of tests to restrict Negro employees to lower paying jobs, and denial to Negro employees of opportunities to participate in apprenticeship and training programs.

> which it is based) . . . the Commission shall furnish [the charged party] with a copy of such charge.

42 U.S.C. § 2000e-5(a) (1970) (emphasis added).

In 1972, Congress revised the statutory provision to its present form (in Section 706(b)):

> Whenever a charge is filed . . . by a member of of the Commission, alleging that [the charged party] . . . has engaged in an unlawful employment practice, *the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practices)* on [the charged party] . . . within ten days, and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation* and shall contain such information and be made in such form as the Commission requires.

42 U.S.C. § 2000e-5(b) (1976) (emphasis added).

The 1972 amendments are significant because they require a commissioner's charge (a) to be under oath and (b) to provide notice of the "date, place, and circumstances" of the alleged violation. If the oath requirement is to have significance, the charge must contain statements susceptible of proof. In a sworn statement of belief, additional allegations as to the source of the affiant's information and the grounds for his belief are essential to permit the judicial mind to determine whether such belief is well- or ill-founded. 3 Am. Jur. 2d *Affidavits* § 22 (1962 2d ed.).[21] The notice requirements were

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21. *See also, Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 354-56 (D.C. Cir. 1949); *United States v. Zagari*, 419 F. Supp. 494, 504 (N.D. Cal. 1976). Since the charge in issue admittedly was based on statistics, it could not be based on personal knowledge, but rather belief. As such, it would need to disclose grounds for the belief to make the oath meaningful.

added by the 1972 amendments "to protect fully the rights of the person or persons against whom the charges are filed," S. Rep. No. 92-415, p. 25 (1971), and "to give [the charged party] an opportunity to gather and preserve evidence in anticipation of a court action."[22] *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 372 (1977). As the court of appeals noted, a commissioner's charge must have some factual specificity to meet the purposes of this notice requirement. 676 F.2d at 326, n.6. For the above reasons, the standard applied to commissioner's charges filed prior to the effective date of the 1972 amendments is not applicable to a commissioner's charge filed thereafter.

The Solicitor also cited *Graniteville Co. (Sibley Div.) v. EEOC*, *supra*, to suggest an inconsistency among the circuits. *Graniteville* involved a charge filed by an individual which (in sharp contrast to the charge in the instant case) was rather specific in alleging discrimination in promotion policies; harassment of Negro employees; segregation of concession stands, locker and toilet facilities; and maintenance of job categories. The court first adopted the employer's position that EEOC is without jurisdiction to proceed with an investigation in the absence of a valid charge. 438 F.2d at 35. The court then concluded that the charge at issue there met the specificity requirements of the 1964 statute. In reaching its conclusion, the court stressed that lay complainants, like the charging party in the case, "are unfamiliar with the niceties of pleading, and nearly always are without the assistance of counsel." *Id.* at 37. It elaborated that "sophisticated general policies

22. EEOC regulations require respondent employer to "preserve all personnel records relevant to the charge or action." 29 C.F.R. § 1602.14(a).

and practices of discrimination are not susceptible to . . . precise delineation by a layman . . . ." *Id.* at 38. By contrast, the court noted that Congress had meant to control "fishing expeditions" by the Commission by requiring a charge-filing Commissioner to acquire "sufficient prior information to have reasonable cause to believe that a statutory violation had occurred." *Id.* at 41. In this context, *Graniteville* does not support the Solicitor's position that the law authorizes a boilerplate commissioner's charge which has no purpose other than the initiation of a fishing expedition by EEOC's OSP.

The last case cited by the Solicitor, *Dean Witter,* has been sufficiently discussed and distinguished previously. *See supra* at 12-13 and 12, n.7.

B. Section 706(b) limits the Commission's authority to launch investigations

The Solicitor next argued that the purpose of a charge is merely to initiate an administrative investigation and that the "pleading requirement" imposed by the Eighth Circuit interferes with the smooth functioning of that investigation. By this argument, the Solicitor dismissed out of hand the statutory provision at issue in this case. Had Congress intended the charge simply to initiate an investigation, it would not have required the charge to be under oath, nor required the Commission to provide notice of the "date, place and circumstances" of the charge. Rather, Congress established these requirements as part of an overall intention to create EEOC as an agency to respond to charges filed under Section 706(b), not with plenary authority to investigate matters of its own unfettered choice.[23]

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23. *See* 18 *supra.*

The Solicitor's argument that generally worded charges are acceptable in the NLRB context, and hence should be acceptable in Title VII practice, is incorrect. While the NLRA did serve as a model for Title VII, that Act does not require that charges be under oath or that notice of date, place and circumstances be provided the respondent.[24] Moreover, the cases cited by the Solicitor to support his argument that "generally worded" charges are acceptable in NLRB practice contradict his argument. The charges in cases such as *NLRB v. Fant Milling Co.*, 258 F.2d 851, 854, n.6, n.7 (5th Cir. 1958), *rev'd*, 360 U.S. 301 (1959) and *Gulf State Manufacturers, Inc. v. NLRB*, 579 F.2d 1298, 1301-02 (5th Cir. 1978) are far more specific than the boilerplate accusations which the Solicitor defends in this case.[25]

C. EEOC does not have sole responsibility for determining the sufficiency of a charge; a charge must meet the statutory requirements.

As his third reason for review, the Solicitor asserted that because Section 706(b) provides that "charges . . . shall contain such information and be in such form as the Commission requires," the court below should have deferred to the Commission's determination of the sufficiency of the charge. This contention is incorrect for two reasons.

First, while EEOC may have primary responsibility for determining the sufficiency of a charge, it does not

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24. *Compare* 29 U.S.C. § 160(b) *with* Section 706(b) of Title VII.

25. In addition, the NLRB has no equivalent of commissioner's charges and no "systemic" program such as gave rise to the charge in this case.

have sole responsibility. A federal district court has a responsibility for determining the sufficiency of a charge whenever EEOC seeks the court's powers to enforce a subpoena[26] and the respondent challenges the sufficiency or validity of the charge upon which the subpoena is based. To avoid abusing its authority by enforcing a subpoena based on an invalid charge, the court must determine the sufficiency and validity of the charge.[27]

Second, in determining the sufficiency of a charge, not only the court but also EEOC must observe the statutory requirements for a charge. EEOC may not take one sentence out of the entire context of Section 706(b). The Eighth Circuit's decision in this case is an entirely proper construction of the statute by a court constitutionally authorized to do so.

Even if the Solicitor's argument were otherwise meritorious, it must be recognized that EEOC regulations require each charge to contain:

> . . . a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . . .

29 CFR § 1601.12(a)(3).

The Solicitor attempted to avoid the impact of this regulation by pointing out that the regulations also provide:

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26. Unless a charged party voluntarily provides information requested by EEOC, EEOC must issue a subpoena to investigate a charge. EEOC does not have the authority to issue a self-enforcing subpoena. Rather, if the subpoena is not voluntarily complied with, EEOC must obtain enforcement of a subpoena through a federal district court. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(2).

27. *See United States v. Powell*, 379 U.S. 48, 58 (1964).

> . . . a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.

29 CFR § 1601.12(b).

The Solicitor contended that this latter regulation governs the sufficiency of a commissioner's charge. However, the obvious purpose of Section 1601.12(b) is to provide latitude for incomplete charges filed by unsophisticated individuals, not to shield commissioner's charges from the regulations. Moreover, in the case of an individual claim, an employer will have less difficulty in determining the facts underlying the charge simply by reviewing the charging party's personnel file or other records of the charging party's contacts with the respondent.

EEOC's authority to determine the "form" of a charge does not limit the effect of the statutory notice requirement. As this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980):

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretations" of the statute cannot supersede the language chosen by Congress.

Id. at 825.

D. The decision below did not establish a pleading requirement inconsistent with Section 706(b)

The Solicitor next asserted that the decision below established pleading requirements which Congress specifi-

cally rejected when it enacted the 1972 amendments. This assertion is incorrect.

The decision below did not establish "pleading requirements." It simply gave effect to the oath and notice requirements of Section 706(b). Certainly, a charge under Title VII is not to be compared to a complaint under the Federal Rules of Civil Procedure. The charge does not frame the issues in litigation, nor does it require an answer from the respondent. It does not reduce the ability of the Commission to expand the scope of its investigation or of an ultimate determination in light of matters that arise out of the charge as initially filed. The term "pleading requirement" is simply inapplicable and, instead, is a piece of jargon used in place of analysis. The real question is whether the Eighth Circuit correctly construed the plain language of Section 706(b).

The standards established by the decision below are consistent with the 1972 amendments. As stated previously, the 1972 amendments (a) replaced the former "reasonable cause to believe" standard of Section 706(a) with the significantly more stringent standard that commissioner's charges be under oath and (b) required notice to be given of the date, place, and circumstances of a charge. *See supra* at 21-22.

E. The Solicitor's reliance on the *Socal* case is misplaced

The Solicitor, for the first time in these proceedings, cited the case of *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (*"Socal"*), as supporting the argument that Shell should not have been permitted to raise the adequacy of the underlying charge or notice as a defense to subpoena

enforcement proceedings.[28] Not a single case cited in the Petition supports the contention that the adequacy of the charge cannot be raised as a defense in subpoena enforcement actions.

This Court in *Socal* did hold that the investigation therein was not subject to review on Socal's complaint because the investigation was an administrative proceeding. Socal's complaint was that there were events which suggested the FTC had not met the standard for its authority in that case, which was a "reason to believe" Socal had violated the FTC Act. In *Socal*, however, there was an absence of a concrete controversy such as is involved in a subpoena enforcement proceeding. In light of these circumstances, this Court held that Socal could not disrupt an ongoing administrative proceeding to attack the FTC's compliance with the standard.

In contrast, the district court in the instant case had a duty to assess the validity of the charge. Since EEOC can issue a subpoena only on the basis of an adequate charge, and the subpoena is not self-enforcing, the validity of the charge becomes subject to review by a district court. This proceeding would be similar to the review conducted by the Eighth Circuit in this subpoena enforcement case.

Moreover, Congress deliberately withheld from EEOC the broad investigative powers it had conferred on the Federal Trade Commission. *See* 18 *supra*. Thus, an admin-

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28. In the district court and court of appeals below, EEOC, citing *Socal*, had argued that Shell should not be permitted to maintain a pre-enforcement action attacking the charge prior to the Commission's institution of subpoena enforcement proceedings. Whatever the merits of the argument, it was effectively mooted when EEOC brought its subpoena enforcement action and the two cases were consolidated.

istrative complaint before that agency and a charge filed with EEOC under Title VII do not represent identical "threshold determinations." Congress has set a much higher standard for Title VII charges, and a district court may well scrutinize the charge to determine if those standards have been met when the Commission invokes its assistance.

CONCLUSION

For the reasons stated above, Shell acquiesces in the Petition to the extent that it seeks this Court's review of the oath and notice requirements relating to the "circumstances" element of Section 706(b). Shell opposes the Petition to the extent it seeks review of the court of appeals' holding with respect to the "date" element since the decision below is in accord with the decisions of both of the other courts of appeals that have considered the issue. If this Court grants the Petition, its review should encompass the subsidiary question: Whether EEOC has authority to launch an investigation that is merely an audit of employment practices.

Respectfully submitted,

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Dated: January 19, 1983

APPENDIX A

Parent Companies and Affiliated Companies
of
SHELL OIL COMPANY

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Business Development Corporation of North Carolina
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Capital Corporation
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal, N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Gravcap, Inc.
Heat Transfer Research Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution
Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Ltd.
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

Office Supreme Court, U.S.
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No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Department of Justice
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(202) 633-2217

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Statutes:

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Miscellaneous:

EEOC 1978 Report: Minorities and Women in Private Industry, Vol. 2 (Feb. 1980) 3, 1a

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REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Although respondent acquiesces in our petition for a writ of certiorari (Resp. Br. 9), it nevertheless raises several arguments regarding the propriety of an investigation into its employment practices and the powers of the Commission in general. In view of our suggestion that this case is appropriate for summary reversal, this brief is filed in reply to certain erroneous legal and factual assumptions upon which respondent's arguments are premised.

1. Respondent argues, for the first time, that the EEOC failed to provide notice of the disputed commissioner's charge within the ten-day period imposed by Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), and suggests that this provides an independent ground for holding the charge

invalid (Resp. Br. 2 n.1).[1] By failing to raise the question in the courts below, respondent has waived any objection to service. In any event, the record demonstrates that service of the charge was timely. Commissioner Norton's charge was issued on September 27, 1979 (Pet. App. 46a), and was filed with the EEOC's St. Louis District Office on October 16, 1979 (Affidavit of Ed Mansfield, at 2 para. 5, Civil No. 81-5020, S.D. Ill.). Respondent admits that it was served with notice ten days later on October 26, 1979 (Resp. Br. 2 n.2).

2. Respondent incorrectly suggests that the commissioner's charge in this case was issued without specific evidence of discrimination (Resp. Br. 2, 9). In so contending, respondent relies on a statistical profile of its employment practices (Resp. Br. 3-4). Respondent states that, as of December 31, 1979, its Wood River workforce was 7.2% black and 7.5% female, compared with an unspecified "appropriate labor market" that was 4.7% black and 8.0% female (*ibid.*). In addition, respondent claims that 12.3% of its Wood River employees hired between July 2, 1965, and December 31, 1979, were black and 9.8% were female (*ibid.*).

Respondent's statistical presentation is entirely immaterial to the existence of the discrimination charged by Commissioner Norton. The charge at issue here alleges that respondent has confined its female employees to office/clerical positions and its black employees to operative and laborer positions (Pet. App. 3a). The undifferentiated total workforce statistics cited by respondent, even if correct, do

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[1]Section 706(b), 42 U.S.C. 2000e-5(b), provides in pertinent part (emphasis added):

> Whenever a charge is *filed* • • • by a member of the Commission, • • • the Commission shall serve a notice of the charge • • • within ten days • • •.

not in any way contradict the charged systemic exclusion of blacks and women from higher-paying positions. Similarly, the fact that respondent may have hired women and blacks as clerical employees or laborers, respectively, is meaningless in the context of the charge, which alleges that the company has failed or refused to recruit, hire, promote, train, select and assign women and blacks for managerial, professional, technical, craft and service worker positions (Pet. 13).[2]

Commissioners' charges are issued under published standards that are applied to an analysis of EEO reporting data and other available information, including individual charge files and data from other administrative agencies (Pet. 5-6, 40a-43a). The statistical data describing the racial and sexual composition of respondent's Wood River Refinery workforce were supplied to the Commission by respondent and clearly provided a basis for a charge of systemic exclusion of blacks from managerial, professional, technical, office/clerical, craft, and service workers positions, and systemic exclusion of women from managerial, professional, technical, craft, operative, laborer and service worker positions.[3]

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[2]Furthermore, respondent's assumption that the appropriate labor market for the Wood River Refinery is 4.7% black and 8.0% female is incorrect. The Wood River Refinery is located in Madison County, Illinois, and is part of the St. Louis Missouri—Illinois Standard Metropolitan Statistical Area (SMSA). The aggregate labor market availability for the SMSA in 1978, undifferentiated by job category, was 13.8% black and 38.0% female (*EEOC 1978 Report: Minorities and Women in Private Industry*, Vol. 2, at 11-280 (Feb. 1980), reproduced as Appendix A, *infra*). The St. Louis SMSA, and not some unspecified region selected by respondent, constitutes the relevant labor market for purposes of the Commission's initial statistical evaluation of respondent's workforce. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308-312 (1977).

[3]The data supplied by respondent, compared with the SMSA availability figures for 1978, are as follows:

SHELL OIL COMPANY, WOOD RIVER REFINERY, EMPLOYMENT CHARACTERISTICS

Source: EEO-1 Reports filed by Shell with the EEOC 1970-1977

YEAR	EEO-1 JOB CATEGORY Managerial		Professional		Technical	
1970						
Total	263		266		168	
Black	0	0%	5	1.9%	3	1.8%
Female	0	0%	4	1.5%	0	0%
1971						
Total	260		236		152	
Black	0	0%	6	2.5%	3	2.0%
Female	0	0%	5	2.1%	0	0%
1972						
Total	266		202		146	
Black	0	0%	5	2.5%	3	2.1%
Female	0	0%	4	2.0%	0	0%
1973						
Total	253		192		148	
Black	0	0%	5	2.6%	4	2.7%
Female	0	0%	4	2.1%	1	0.7%
1974						
Total	242		181		152	
Black	0	0%	5	2.8%	6	3.9%
Female	0	0%	6	3.3%	4	2.6%
1975						
Total	251		162		150	
Black	1	0.4%	5	3.1%	6	4.0%
Female	0	0%	5	3.1%	3	2.0%
1976						
Total	241		102		83	
Black	1	0.4%	6	5.9%	3	3.6%
Female	0	0%	6	5.9%	1	1.2%
1977						
Total	257		97		85	
Black	1	0.4%	3	3.1%	3	3.5%
Female	0	0%	7	7.2%	1	1.2%
1978						
Total	238		94		84	
Black	1	0.4%	5	5.3%	3	3.6%
Female	0	0%	10	10.6%	1	1.2%

PERCENT AVAILABILITY, SAINT LOUIS STANDARD METROPOLITAN STATISTICAL AREA, 1978

Source: EEOC 1978 Report: Minorities and Women in Private Industry, Vol. 2, at II-280 (Feb. 1980)

1978	EEO-1 JOB CATEGORY Managerial	Professional	Technical
Black	**4.3%**	**4.5%**	**13.2%**
Female	**16.9%**	**32.9%**	**39.6%**

EEO JOB CATEGORY CHART (continued)

Craft		Service		Office Clerical		Operative Laborer	
920		40		139		478	
2	0.2%	0	0%	8	5.8%	30	6.3%
0	0%	0	0%	103	74.1%	0	0%
929		30		122		460	
3	0.3%	0	0%	6	4.9%	40	8.7%
0	0%	0	0%	83	68.0%	0	0%
894		29		116		447	
9	1.0%	0	0%	6	5.2%	27	
0	0%	0	0%	77	67.0%	0	0%
840		29		112		448	
9	1.1%	0	0%	5	4.5%	31	6.9%
0	0%	0	0%	75	66.4%	0	0%
815		28		112		476	
7	0.9%	1	3.6%	6	5.4%	47	9.9%
0	0%	0	0%	78	69.6%	4	0.8%
788		25		111		467	
7	0.9%	1	4.0%	7	6.3%	62	13.3%
0	0%	0	0%	77	69.4%	15	3.2%
763		22		96		424	
11	1.4%	1	4.5%	7	7.3%	59	13.9%
0	0%	0	0%	64	66.7%	15	3.5%
793		22		92		395	
18	2.3%	1	4.5%	7	7.6%	61	15.4%
1	0.1%	0	0%	63	68.5%	20	5.1%
763		22		96		422	
19	2.4%	1	4.5%	9	9.4%	66	15.6%
1	0.1%	1	4.5%	68	70.8%	23	5.5%

Craft	Service	Office Clerical	Operative Laborer
8.2%	30.1%	12.1%	21.2%
7.8%	56.7%	81.0%	24.3%

The Commission did not introduce these data below because of its position, to which it adheres, that it is not required to provide such information in order to obtain enforcement of a subpoena issued pursuant to a charge. While these data demonstrate that the Commission could provide the basis for the commissioner's charge in this case, Section 706(b), 42 U.S.C. 2000e-5(b), does not require the Commission to provide the "factual basis" found necessary by the court below. See Pet. 9-16. A subpoena enforcement action should not become, as this one has, a "mini-trial" on the merits of the administrative charge. The lower court's decision, which portends substantial litigation regarding the factual sufficiency of Title VII charges (Pet. 20), improperly interferes with the functioning of the Commission and unduly intrudes the district courts into the EEOC administrative process. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242-243 (1980).

Respondent evidently believes that the St. Louis Standard Metropolitan Statistical Area (see note 2, *supra*) is an inappropriate reference for comparison with its labor force, or that its practices are not reflected in the statistical composition of its workforce. Respondent is, of course, free to present its views to the Commission in order to influence the Commission's determination of whether there is reasonable cause to believe the allegations of the charge. Respondent, however, seeks the opportunity to conduct a preliminary trial on the merits of the charge in district court, before the Commission has been permitted access to the documents that could establish or disprove the existence of discrimination in the affected job categories. This Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242-243 (1980), mandates a different result: "Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes."

3. Respondent's contention (Resp. Br. 12 n.7) that the commissioner's charge in this case failed to comply with the "date" requirement of Section 706(b), 42 U.S.C. 2000e-5(b), is without merit. July 2, 1965, was specified as the starting date for respondent's alleged violations. This date, contrary to respondent's assertions (Resp. Br. 12 n.7), is not mere "boilerplate." [4] The Commission has used July 2, 1965, only in special circumstances, such as where pre-charge information indicates a history of assignment or promotion discrimination that has been continued and perpetuated by collective bargaining agreements. In such cases, specification of

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[4]The Commission's practice refutes any suggestion that July 2, 1965, is inserted as "boilerplate" into "every case" (Resp. Br. 12 n.7) without reference to special circumstances. Of 139 outstanding commissioners' charges being handled through the Office of Systemic Programs, only 19 specify the effective date of Title VII (July 2, 1965) as the beginning date for the charged discrimination.

the effective date of Title VII as the beginning date of the charged discrimination is appropriate in order to facilitate seniority relief to the full extent permitted by law. The commissioner's charge in this case alleged systematic discrimination in promotion, training, assignment and selection of employees. Respondent has been hiring women and blacks since the effective date of Title VII into this allegedly discriminatory system. In these circumstances, July 2, 1965, is an entirely reasonable and good-faith estimate of the probable time period of respondent's misconduct, and fully satisfies the requirements of Section 706(b). *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980).[5]

Respondent has received all that Section 706(b) requires—a concise statement of what it has allegedly done in violation of Title VII of the Civil Rights Act of 1964. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 & n.32 (1977). The "date" requirement of Section 706(b) does not require the technical precision respondent would impose on the Commission. As we noted in our petition (Pet. 13) and as recognized by the Ninth Circuit, "[t]he filing of a charge is the first step in the EEOC administrative process, and understandably, the EEOC may be uncertain about the temporal scope of the challenged practices, especially where a pattern or practice charge is involved." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. Respondent is of course entitled to argue to the Commission that it did not commit unlawful acts in the time period charged in this case. Respondent, however, may not claim that it does not know what it is charged with doing.

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[5]There is no substance to respondent's contention that July 2, 1965, is insufficient as a matter of law to provide an employer with notice of the beginning date of its discriminatory practices (Resp. Br. 12-15). If accepted, the argument would mean that the worst offender under Title VII, the employer that had never acted to integrate its segregated workforce after the passage of Title VII, could not be accurately charged under Title VII simply because of the extent of its discrimination.

4. Respondent's remaining contention (Resp. Br. 16-19), that the Commission is not authorized to conduct "audits" of employers, rests upon a misapprehension of Title VII, and is not properly before the Court. Respondent argues that the EEOC may only "investigate and conciliate alleged discrimination brought by and on behalf of employees" (*id.* at 17) and is therefore powerless to act against discrimination unless an individual employee or his representative files a charge of discrimination (*id.* at 7, 20). Employment statistics alone, respondent contends, "cannot be the predominant reason for a charge, nor can they provide a sufficient factual basis in and of themselves" (*id.* at 17 n.13). The court of appeals, however, rejected this argument, holding that statistics are sufficient to support the issuance of a commissioner's charge (Pet. App. 11a). Respondent, moreover, cites no authority in support of its novel suggestion that statistical data are not sufficient support for a commissioner's charge. *Cf. Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977) (statistical data sufficient to constitute prima facie proof of a pattern or practice of discrimination). The question, in any event, is not before the Court. The court of appeals decided the issue against respondent, and respondent has not petitioned this Court for review.[6]

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[6]Respondent is, of course, entitled "to urge any grounds which would lend support to the judgment below" (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977)). The court of appeals, however, held that Section 706(b) does not prohibit "the filing of a Commissioner's charge which is based on statistical data obtained by the Commissioner from annual reports" (Pet. App. 11a n.5) and remanded the case for further proceedings based on that premise. Thus, respondent's contention that the Commission lacks authority to issue charges based on statistical audits does not support the judgment below, and is not properly before the Court. *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

CONCLUSION

The petition for a writ of certiorari should be granted. Because respondent's factual assertions are immaterial and do not affect our view that the error of the court of appeals is manifest, we again suggest that the Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

APPENDIX A

EEOC, 1978 Report: Minorities and Women in Private Industry, Vol. 2, at II - 280 (Feb. 1980):

Table 1. Occupational Employment in Private Industry by Race/Ethnic Group/Sex and by Industry for SMSA's with Population of 1,000,000 or more, 1978

St. Louis, Missouri-Illinois

All Industries (2227 units)

Race Ethnic Group/ Sex	Total Employment	Officials and Managrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Number Employed						
All Employees	494,511	56,223	44,960	21,547	52,366	76,215	64,434	100,881	28,616	49,269
Male	306,828	46,742	30,179	13,010	23,620	14,493	59,418	76,798	21,247	21,321
Female	187,683	9,481	14,781	8,537	28,746	61,722	5,016	24,083	7,369	27,948
White	419,220	53,072	41,734	18,401	47,256	65,997	58,370	79,558	20,925	33,907
Male	264,799	44,450	28,374	11,882	21,513	12,683	54,347	61,617	15,287	14,646
Female	154,421	8,622	13,360	6,519	25,743	53,314	4,023	17,941	5,638	19,261
Minority	75,291	3,151	3,226	3,146	5,110	10,218	6,064	21,323	7,691	15,362
Male	42,029	2,292	1,805	1,128	2,107	1,810	5,071	15,181	5,960	6,675
Female	33,262	859	1,421	2,018	3,003	8,408	993	6,142	1,731	8,687
Black	68,371	2,418	2,027	2,843	4,369	9,289	5,256	20,228	7,185	14,836
Male	37,386	1,667	912	942	1,752	1,503	4,355	14,364	5,525	6,366
Female	30,985	751	1,115	1,901	2,617	7,786	901	5,864	1,660	8,470

EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
					Number Employed					
Hispanic	3,850	359	341	115	518	621	526	709	404	257
Male	2,716	309	283	76	248	196	487	589	361	167
Female	1,134	50	58	39	270	425	39	120	43	90
Asian/Pacific Islander	1,959	185	713	148	153	210	104	181	52	213
Male	1,177	160	491	88	69	74	61	89	36	109
Female	782	25	222	60	84	136	43	92	16	104
Amind/Alaskan Native	1,111	189	145	40	70	178	178	205	50	56
Male	750	156	119	22	38	37	168	139	38	33
Female	361	33	26	18	32	141	10	66	12	23
					Participation Rate					
All Employees	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Male	62.1	83.1	67.1	68.4	45.1	19.0	92.2	76.1	74.3	43.3
Female	38.0	16.9	32.9	39.6	54.9	81.0	7.8	23.9	25.8	56.7
White	84.8	94.4	92.8	85.4	98.2	85.6	98.6	78.9	73.1	68.8
Male	53.6	78.1	63.1	55.1	41.1	16.6	86.0	64.1	55.6	28.7
Female	31.2	15.3	29.7	30.3	49.2	70.0	6.3	17.8	10.7	39.1

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EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Participation Rate						
Minority	15.2	5.6	7.2	14.6	9.8	13.4	9.4	21.1	26.9	31.2
Male	8.5	4.1	4.0	5.2	4.0	2.4	7.9	15.1	20.8	13.6
Female	6.7	1.5	3.2	9.4	5.7	11.0	1.5	6.1	6.1	17.6
Black	13.8	4.3	4.5	13.2	8.3	12.1	8.2	20.1	25.1	30.1
Male	7.6	3.0	2.0	4.4	3.4	2.0	6.8	14.2	19.3	12.9
Female	6.3	1.3	2.5	8.8	5.0	10.1	1.4	5.8	5.8	17.2
Hispanic	.8	.6	.8	.5	1.0	.8	.8	.7	1.4	.5
Male	.6	.6	.6	.4	.5	.3	.8	.6	1.3	.3
Female	.2	.1	.1	.2	.5	.6	.1	.1	.2	.2
Asian/Pacific Islander	.4	.3	1.6	.7	.3	.3	.2	.2	.2	.4
Male	.2	.3	1.1	.4	.1	.1	.1	.1	.1	.2
Female	.2	•	.5	.3	.2	.2	.1	.1	.1	.2
Amind/Alaskian Native	.2	.3	.3	.2	.1	.2	.3	.2	.2	.1
Male	.2	.3	.3	.1	.1	.1	.3	.1	.1	.1
Female	.1	.1	.1	.1	.1	.2	•	.1	•	.1

EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employ-ment	Officials and Mangrs.	Profes-sionals	Techni-cians	Sales Workers	Office & Clerical Workers	Craft Workers	Opera-tives	Laborers	Service Workers
				Occupational Distribution						
All Employees	100.0	11.4	9.1	4.4	10.6	15.4	13.0	20.4	5.8	10.0
Male	100.0	15.2	9.8	4.2	7.7	4.7	19.4	25.0	6.9	7.0
Female	100.0	5.1	7.9	4.6	15.3	32.9	2.7	12.8	3.9	14.9
White	100.0	12.7	10.0	4.4	11.3	15.7	13.9	19.0	5.0	8.1
Male	100.0	16.8	10.7	4.5	8.1	4.8	20.5	23.3	5.8	5.5
Female	100.0	5.6	8.7	4.2	16.7	34.5	2.6	11.6	3.7	12.5
Minority	100.0	4.2	4.3	4.2	6.8	13.6	8.1	28.3	10.2	20.4
Male	100.0	5.5	4.3	2.7	5.0	4.3	12.1	36.1	14.2	15.9
Female	100.0	2.6	4.3	6.1	9.0	25.3	3.0	18.5	5.2	26.1
Black	100.0	3.5	3.0	4.2	6.4	13.5	7.7	29.6	10.5	21.7
Male	100.0	4.5	2.4	2.5	4.7	4.0	11.7	38.4	14.8	17.0
Female	100.0	2.4	3.6	6.1	8.5	24.9	2.9	18.9	5.4	27.3
Hispanic	100.0	9.3	8.9	3.0	13.5	16.1	13.7	18.4	10.5	6.7
Male	100.0	11.4	10.4	2.8	9.1	7.2	17.9	21.7	13.3	6.2
Female	100.0	4.4	5.1	3.4	23.8	37.5	3.4	10.6	3.8	7.9

EEOC, 1978 Report (continued):

Race Ethnic Group Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Occupational Distribution						
Asian/Pacific Islander	100.0	9.4	36.4	7.6	7.8	10.7	5.3	9.2	2.7	10.9
Male	100.0	13.6	41.7	7.5	5.9	6.3	5.2	7.6	3.1	9.3
Female	100.0	3.2	28.4	7.7	10.7	17.4	5.5	11.8	2.1	13.3
Amind/Alaskan Native	100.0	17.0	13.1	3.6	6.3	16.0	16.0	18.5	4.5	5.0
Male	100.0	20.8	15.9	2.9	5.1	4.9	22.4	18.5	5.1	4.4
Female	100.0	9.1	7.2	5.0	8.9	39.1	2.8	18.3	3.3	6.4

*Less than 0.05 percent.

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No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether a charge of unlawful employment discrimination filed by a Commissioner of the Equal Employment Opportunity Commission under Section 706(b) of Title VII of the Civil Rights Act of 1964 is invalid because it sets forth the asserted discriminatory practices in general terms rather than articulating the factual basis for the allegations.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 676 F.2d 322, and the decision denying rehearing en banc (Pet. App. 34a-39a) is reported at 689 F.2d 757. The opinion of the district court (Pet. App. 15a-31a) is published at 523 F. Supp. 79.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982 (Pet. App. 32a-33a). The opinion of the court of appeals was modified and a petition for rehearing was denied on July 20, 1982 (Pet. App. 10a-14a, 34a-39a).

The petition for a writ of certiorari was filed on November 16, 1982, and granted on February 22, 1983 (J.A. 183). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, and the EEOC's Procedural Regulations, 29 C.F.R. 1601.12, are set forth at Pet. 2-3. The Commission's Standards for Selecting Systemic Respondents, E.E.O.C. Compl. Man. (CCH) § 16.2 (1979), and the Procedure for Selecting Systemic Respondents (*id.* at 16.3) are set forth at Pet. App. 40a-43a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. Section 703, 42 U.S.C. 2000e-2. Under the Act, charges of discrimination may be filed by or on behalf of a person aggrieved, or by a member of the Equal Employment Opportunity Commission. Section 706(b), 42 U.S.C. 2000e-5(b).

Section 706(b) provides that all charges "shall be in writing under oath or affirmation, and shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)). The Commission's regulations require a charge of discrimination to contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices" (29 C.F.R. 1601.12(a)(3)), but further provide that, notwithstanding the above, a written charge is sufficient if it identifies the parties and "describe[s] generally the action or practices complained of" (Section 1601.12(b)).

Section 706(b) further provides that, within 10 days of the filing of a charge, the Commission "shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the respondent. 42 U.S.C. 2000e-5(b).[1] The

[1] Although Section 706(b) expressly leaves the form and content of administrative charges to the informed discretion of the

Commission must then undertake an investigation to determine whether reasonable cause exists to believe that the charge is true. *Ibid.* During the course of this investigation, the Commission is entitled to inspect and copy any evidence of the person or firm being investigated (Section 709(a), 42 U.S.C. 2000e-8(a)), and may issue subpoenas that can be enforced upon application to the district courts. Section 710, 42 U.S.C. 2000e-9 (incorporating Section 11 of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 161). If the Commission finds insufficient evidence to support a finding of reasonable cause, the Commission notifies the charging party of its conclusion and takes no further action. Section 706(b), 42 U.S.C. 2000e-5(b). If, however, the Commission finds that reasonable cause exists, it must endeavor to eliminate any alleged unlawful practices through informal methods of conference, conciliation and persuasion before resorting to a civil enforcement action brought in federal court. Section 706(b) and (f), 42 U.S.C. 2000e-5(b) and (f).[2]

2. Many charges are filed directly by aggrieved complainants. A commissioner's charge may be filed on behalf of an aggrieved person, however, where that individual is unwilling to come forward publicly for fear of

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Commission (42 U.S.C. 2000e-5(b)), some courts, including the court below, have stated that it "is not entirely clear" (Pet. App. 6a n.3) whether the " 'date, place and circumstances' should be in the charge itself * * * or in the notice of the charge." *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337 n.2 (9th Cir. 1980). The current Commission practice is to provide respondents with a copy of the administrative charge in satisfaction of Section 706(b)'s notice requirements. 29 C.F.R. 1601.14.

[2] Should informal conciliation efforts fail, the Commission is empowered to bring a civil action against any respondent "not a government, governmental agency, or political subdivision" (Section 706(f), 42 U.S.C. 2000e-5(f)). Cases involving governmental agencies or other political subdivisions are "refer[red] * * * to the Attorney General who may bring a civil action against such respondent" (*ibid.*).

economic or physical reprisal. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 26 (1971). Moreover, Section 707 of Title VII grants the Commission "authority to investigate and act on a charge of a pattern or practice of discrimination" (42 U.S.C. 2000e-6(e)).[3] Commissioners' charges, therefore, are filed in two circumstances: to protect the identity of an aggrieved individual, see 29 C.F.R. 1601.7 and 1601.11, and to alleviate instances of systemic discrimination that may not be readily identifiable on the basis of individual complaints alone. See, *e.g.*, *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

In order to isolate "situations where the patterns of employment discrimination are the most serious, and where maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women" (E.E.O.C. Compl. Man. (CCH) § 16.1 (1982)), the Commission has developed guidelines for identifying employers that may be engaged in systemic discrimination. E.E.O.C. Compl. Man., Pet. App. 40a-43a. These systemic guidelines contemplate that commissioners' charges may be issued against respondents that meet one or more of the published standards. *Id.* at 40a-44a.[4] These

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[3] "Pattern or practice" charges under Section 707(e), 42 U.S.C. 2000e-6(e), may be filed by a member of the Commission and are processed in accordance with the procedures outlined in Section 706.

[4] Relevant factors under the systemic guidelines include: whether an employer "continues[s] in effect policies and practices which result in low utilization of available minorities and/or women;" whether an employer hires "a substantially smaller proportion of minorities and/or women" in its higher paid than its lower paid job categories; whether an employer maintains recruitment, hiring, assignment, promotion, discharge or other policies not justified by business necessity "that have an adverse impact on minorities and/or women;" whether an employer utilizes restrictive employment practices that "are likely to be used as models for other employers;" and whether an employer provides available minorities and women with fair access to employment if the employer has "substantial numbers of employment opportunities" (Pet. App. 40a-41a).

standards are applied to "an analysis of EEO reporting data and other available information," including individual charge files and data from other administrative agencies. *Id.* at 41a-42a. A potential systemic charge passes through successive stages of staff review before being presented to a commissioner with a memorandum detailing the preliminary data supporting issuance of a charge. *Id.* at 41a-43a. Although a complaint by an aggrieved individual may provide the basis of a systemic charge (see 29 C.F.R. 1601.6), commissioners' charges generally are based upon an analysis of the statistical data contained in annual reports filed by employers with the Commission and the Department of Labor's Office of Federal Contract Compliance Programs.

3. On September 27, 1979, Eleanor Holmes Norton, then Chair of the Commission, issued a sworn commissioner's charge against the respondent, Shell Oil Company, alleging unlawful employment practices at respondent's Wood River Refinery, Wood River, Illinois. The charge was the product of the Commission's systemic charge process, and Commissioner Norton stated that she had cause to believe that respondent "has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment" (Pet. App. 44a). The charge specified that such discrimination resulted from respondent's unlawful exclusion of Blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions" and the company's similar exclusion of women from "managerial, professional, technical, craft, operative, laborer and service worker positions" (*ibid.*). The charge was subsequently amended to state that Commissioner Norton had reason to believe that respondent had engaged in the unlawful practices on a continuing basis from at least

July 2, 1965, to the present (*id.* at 47a). See *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337-1338 (9th Cir. 1980).

The charge was filed with the EEOC's St. Louis District Office on October 16, 1979 (J.A. 59). The charge, along with a request for information regarding respondent's employment practices, was served on the company 10 days later (*id.* at 60). 42 U.S.C. 2000e-5(b). Although respondent recognized that the charge was based, at least in part, on its annual EEO-1 reports that had been filed with the Commission (J.A. 92, 157),[5] the company refused to comply with the Commission's request for information on the ground that the Commission possessed an insufficient factual basis for "the broad general allegations stated in the charge" (*id.* at 90). Respondent argued that any investigation of its employment practices was improper because its "bottom line statistics reflect that there is no violation of the Civil Rights Act of 1964 as amended on a systemic basis" (*id.* at 93). The company sought to bolster its objection to the merits of the charge by describing its undifferentiated aggregate workforce statistics (*id.* at 90-91) and asserting that its record was "clearly not the profile anticipated for a Commissioner's Charge" (*id.* at 90). The company also suggested that the appropriate labor market for purposes of statistical comparison was not the St. Louis Standard Metropolitan Statistical Area (SMSA), but instead a smaller region of selected counties (*ibid.*).

In response to the company's asserted defenses, the Commission pointed out that respondent's submission of facility totals, rather than information by particular job categories, was insufficient to permit meaningful analysis (J.A. 106). In addition, the Commission stated that the evidence submitted by respondent was insufficient to permit an evaluation of its defense based on non-SMSA labor market availability, a defense the Com-

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[5] EEO-1 reports detail the statistical composition of an employer's workforce by job category, race and sex (see Pet. Reply Br. 4-6).

mission regarded as premature in any event at the investigatory stage (*id.* at 95).

When informal efforts to obtain the requested employment information proved fruitless, the Commission issued a subpoena duces tecum on May 15, 1980, requiring respondent to produce certain employment information covering the years 1976 to the present (J.A. 60, 112-127). In accordance with Commission regulations, respondent petitioned the St. Louis District Director to revoke or modify the subpoena (*id.* at 139-144). After considering each of respondent's 16 objections, the District Director, with one exception, denied its petition to revoke or modify the subpoena (*id.* at 145-152).[6] Respondent then appealed the District Director's determination to the Commission's General Counsel (*id.* at 154-163), asserting that the data available to the Commission did not "provide a basis for finding reasonable cause" (*id.* at 157). The General Counsel upheld the District Director's determination (*id.* at 164-168) and ordered respondent to comply with the subpoena by September 18, 1980 (*id.* at 168).

Respondent did not comply with the subpoena, but instead filed this suit in federal district court in Missouri to quash the subpoena and enjoin the Commission's investigation. Respondent alleged that the charge was invalid under Section 706(b) because it failed to disclose sufficient facts to form a basis for its allegations of discrimination.[7] Respondent sought extensive discov-

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[6] The District Director rejected arguments, *inter alia*, that the charge was filed without reasonable cause (J.A. 146), did not provide notice (*id.* at 146-147), was beyond the Commission's authority (*id.* at 147), sought irrelevant information (*ibid.*) and was overly burdensome (*id.* at 147). The Director, however, did modify the definition of "test" contained in the subpoena to eliminate any ambiguity (*id.* at 150).

[7] Respondent renewed a number of other objections to enforcement of the subpoena, contending, *inter alia*, that the subpoena contravened the terms of the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.*, the Trade Secrets Act, 18 U.S.C. (Supp. V) 1905, and

ery relating to all Commission subpoenas issued since 1976 (J.A. 50-51), pending commissioner's charges (*id.* at 52-53), internal Commission procedures for recommending commissioner's charges (*id.* at 52), Commission personnel practices regarding performance bonuses or merit awards (*ibid.*), and interagency communications regarding the Federal Reports Act (~~Pet. App.~~ at 51-52). In February 1981, the Commission filed an action in the Southern District of Illinois to enforce the subpoena. Civ. No. 81-5020 (S.D. Ill.) (J.A. 4). The enforcement action was transferred to Missouri, where the district court rejected respondent's arguments and enforced the Commission's subpoena (Pet. App. 15a-31a).

The district court concluded that respondent's "allegation that the Commissioner's charge does not specify sufficient facts is * * * meritless" (Pet. App. 24a). The court recognized that the "purpose of a charge under section 706, 42 U.S.C. § 2000e-5, is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case" (Pet. App. 24a). The court further noted that, under Commission regulations, a charge "is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" (*id.* at 25a). 29 C.F.R. 1601.12(b). The court concluded that the present charge fully meets these requirements (Pet. App. 24a-25a).

On appeal, the Eighth Circuit reversed (Pet. App. 1a-14a.) The panel held that the charge failed to state "sufficient facts to comply with the date, place and circumstances requirements of section 706(b)" (Pet. App. 5a). The court of appeals found that the specification of July 2, 1965, as the beginning date for respondent's alleged continuing misconduct was insufficient because

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the Due Process Clause of the Fifth Amendment. See Pet. App. 17a-25a. The district court (*ibid.*) and the court of appeals (*id.* at 9a, 13a) rejected these claims.

"[w]e find no factual basis" to support the date (*id.* at 7a). The court further held that the circumstances of the charge must be supported by an articulated "factual basis" (*id.* at 8a). The court reasoned that "the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations" (*ibid.*). Notwithstanding Section 706(b), which provides that charges "shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5 (b)), the court concluded that "[a] sufficient Commissioner's charge should contain the following information: the type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (*e.g.*, failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (*e.g.*, applicant, employee, former employee)" (Pet. App. 12a).

On July 20, 1982, the court denied the Commission's motion for rehearing en banc, Chief Judge Lay dissenting. Chief Judge Lay noted that the decision placed the circuit "in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a Title VII charge" (Pet. App. 35a). Chief Judge Lay also criticized the practical impact of the panel decision on Commission enforcement procedures (*id.* at 38a):

> It would appear that the panel decision would require the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause. Furthermore, the court's decision would impose the pleading standards of the Federal Rules of Civil Procedure, Fed. R. Civ P. 8, upon an administrative fact-finding investigation. Such a position is supported

by neither logic nor precedent, and would severely undermine the Commission's ability to bring commissioner's charges of discriminatory patterns and practices as authorized under 42 U.S.C. § 2000-5[.]

SUMMARY OF ARGUMENT

1. Section 706(b) and its implementing regulations do not require the Commission to articulate the factual basis underlying a Commissioner's charge. Section 706 (b) expressly provides that "charges * * * shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). Commission regulations have consistently provided that a charge is sufficient if it identifies the parties and generally describes the action or practices complained of. 29 C.F.R. 1601.12(b). Prior to the decision below, the courts of appeals had uniformly upheld the Commission's interpretation of Section 706. "The purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. * * * [The section] only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged." *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

The decision below is also at odds with the legislative history of Section 706. As originally enacted, Section 706(a) required a commissioner's charge to "set[] forth the facts upon which it is based" (Pub. L. No. 88-352, 78 Stat. 259). Nevertheless, the courts of appeals uniformly concluded that Section 706 did not require the Commission to "plead evidence" (*Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d 237, 241 (9th Cir. 1971)). In the 1972 amendments to Title VII, Congress deleted the requirement that a commissioner's charge set forth "facts," substituting instead the notice provisions of Section 706(b) (42 U.S.C. 2000e-5(b)). Congress' determination that Title VII respondents should receive notice of

the "date, place and circumstances" of all charged discrimination (*ibid.*), however, does not justify the court of appeals' creation of factual pleading requirements for commissioners' charges. Section 706(b), as amended, was designed to notify a respondent that a charge is pending before the Commission; it does not impose "strict technical pleading requirement[s] upon complainants, whether they be private parties or the Commissioners of the EEOC" (*EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980)).

The court of appeals erred in requiring specification of the "factual basis" (Pet. App. 14a) for the date and circumstances of the discrimination alleged by Commissioner Norton. The charge in this case disclosed the precise circumstances justifying Commission inquiry into respondent's employment practices: allegedly discriminatory exclusion of blacks from six designated job categories and similar exclusion of women from seven such categories. The date utilized by Commissioner Norton, moreover, is "a good faith estimate of the probable time period[]" of respondent's misconduct. *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. The charge alleged a broad pattern of discrimination affecting all black and female employees in several job categories. Such a pattern or practice seldom, if ever, has a discrete beginning date, and the Commission cannot be required to provide any such date at the very threshold of its inquiry into an employer's discriminatory practices. Because respondent has been hiring blacks and women into its allegedly discriminatory employment system since the effective date of Title VII, Commissioner Norton's use of that date—July 2, 1965—as the starting date for respondent's misconduct was entirely proper. That date, moreover, fully informs respondent of the temporal scope of its alleged misconduct.

2. The district court's inquiry in a subpoena enforcement action is decidedly limited. A subpoena enforcement proceeding is not a forum for "'a general inquiry into the sufficiency of the evidence supporting a charge'"

(*Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36). Title VII "restrict[s] the district court's inquiry in subpoena enforcement actions to whether the information sought is material and relevant" (*EEOC* v. *K-Mart Corp.*, 694 F.2d 1055, 1065 (6th Cir. 1982)). Questions regarding the existence of reasonable cause and the appropriateness of particular remedies, therefore, "must await the completion of the administrative process before the district court may properly review them" (*EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977)).

Nor is more particularized pleading necessary to afford "fair notice" or prevent "abuse of governmental power" (Resp. Br. In Opp. 15, 17). The charge in this case clearly informed respondent of the substance of the allegations against it. It would be anomalous to require the Commission to plead evidence in order to commence an administrative investigation, when such particularity is not required to bring a civil enforcement action in federal court. Unless the Commission must present its proof along with its charge, "it is difficult to see what additional information the Commissioner should set forth as facts supporting [her] charge" (*Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799, 800 (6th Cir. 1970)). The requirement that commissioners' charges be filed under oath, moreover, provides a safeguard for Title VII respondents against the possibility of an errant bureaucracy.

The objection that generally worded charges constitute mere "fishing expeditions" carries little force. "When investigative and accusatory duties are delegated by statute to an administrative body, it * * * may take steps to inform itself as to whether there is probable violation of the law." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643 (1950). Because the "investigatory powers of the EEOC should be interpreted broadly" (*EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066), any "fishing expedition" argument premised upon the parenthetical notice provisions of Section 706(b) is particularly unpersuasive.

"[I]t would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field * * * and then, by a parenthetical clause, disable it from normal and effective investigation." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

3. The decision below unduly intrudes the federal courts upon EEOC administrative proceedings at their very outset. Under that decision, the federal courts—not the Commission—would be the final arbiters of whether particular facts justify an administrative inquiry. But the courts should not be drawn into probing the "factual basis" of Commission charges any more than they should second guess whether other administrative agencies have properly issued an administrative complaint. "Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 243 (1980). The decision below erroneously and all too readily "enable[s] those subject to administrative authority unduly to delay investigations into their affairs." B. Schwartz, *Administrative Law* § 45, at 115 (1976).

ARGUMENT

The court of appeals erred in refusing to enforce the Commission's investigatory subpoena on the ground that the allegations in Commissioner Norton's charge lacked a "factual basis" (Pet. App. 14a). Contrary to the conclusion of the court below, the amended charge at issue here meets all the requirements of Section 706(b) and applicable Commission regulations and fully justifies Commission inquiry into respondent's employment practices. Commissioner Norton's charge was rendered under oath and identified the place of discrimination as respondent's Wood River facility (Pet. App. 44a, 47a). The charge, moreover, specified the circumstances justifying an inquiry into respondent's employment practices: allegedly

discriminatory exclusion of blacks from six designated job categories and similar exclusion of women from seven designated job categories (*id.* at 44a-45a). Finally, the charge, as amended, stated that respondent had engaged in such practices "on a continuing basis from at least July 2, 1965, until the present" (*id.* at 47a).

The court of appeals, contrary to uniform precedent, concluded that the charge failed to meet the notice provisions of Section 706(b) because it was not supported by an articulated "factual basis" (Pet. App. 14a) and specified July 2, 1965, as the starting date for the alleged discrimination (*id.* at 11a-12a).[8] The court ordered the case remanded to the district court to permit the Commission to provide a "factual basis" for the date and circumstances of the alleged discrimination (*id.* at 12a-14a). The detailed pleading requirement created by the court of appeals, however, unduly expands the scope of a summary subpoena enforcement proceeding, goes far beyond the requirement of fair notice, and erroneously intrudes the federal courts into an administrative proceeding at its very outset.

I. THE CHARGE IN THIS CASE FULLY SATISFIES THE REQUIREMENTS OF TITLE VII

A. Section 706(b) and its Implementing Regulations Do Not Require the EEOC to Articulate the Factual Basis Underlying a Commissioner's Charge

Title VII establishes "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The primary purpose of a Section 706(b) charge is to initiate an administrative investigation to determine whether

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[8] The court noted that the "place" requirement of Section 706(b)'s notice provisions was not in dispute—the charge clearly identified the Wood River Refinery as the site of the alleged discrimination (Pet. App. 7a n.4).

there is reasonable cause to believe that an employer has violated Title VII. The initial charge does not commence a formal civil enforcement action against a respondent, but rather is merely the first step in an integrated procedure that emphasizes informal conciliation. Consistent with the discrete function of a Section 706(b) charge, Commission regulations and the prior decisions of the courts of appeals have uniformly established that a Commissioner's charge need not incorporate the detailed "factual basis" found necessary below (Pet. App. 14a). The legislative history of Section 706(b), moreover, clearly supports this conclusion.

1. Section 706(b) expressly states that "charges • • • shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). Commission regulations have consistently provided that a charge is sufficient if it generally describes the practices forming the basis of the complaint. See Equal Employment Opportunity Commission Procedural Regulations, 29 C.F.R. 1601.11(b). Current Commission regulations state that a charge should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. 1601.12(a)(3). Notwithstanding those requirements, however, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." Section 1601.12(b). Commission regulations have never required Title VII charges to embody an articulated "factual basis" (Pet. App. 14a).

The district court applied the Commission's regulations to Commissioner Norton's charge and properly rejected respondent's assertion that the charge "does not specify sufficient facts" (Pet. App. 24a). The district court quoted 29 C.F.R. 1601.12(b), set out above, and concluded that "[a]ccording to this standard, the Commissioner's charge is sufficient, because it is a typewritten statement

which identifies the parties involved as being Shell Oil Company and the EEOC, and it describes generally the practices complained of as failing or refusing to recruit, hire, promote, train, assign, or select Blacks and/or females for managerial, professional, technical, craft, and service worker positions, *inter alia*, because of their race and/or sex" (*id.* at 25a). Because the charge was "sworn to by Commissioner Norton, and substantially complied with Commission guidelines" (*id.* at 25a), the district court rejected respondent's evidentiary attack as "meritless" (*id.* at 24a).

By contrast, the court of appeals, without adverting to the Commission's determination that generally worded charges are sufficient under Section 706(b), concluded that a valid charge requires "some factual or statistical basis" (Pet. App. 12a). The court of appeals erred in substituting its own sufficiency requirements for those adopted by the Commission.

The longstanding interpretation by a federal agency of its founding statute is entitled to great respect. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981). The deference accorded an agency's interpretation is particularly great when that interpretation has remained consistent over a long period of time. *Ibid.* See, *e.g.*, 31 Fed. Reg. 10269 (1966). In this case, where the question before the court of appeals centered upon the necessary procedures for instituting an administrative investigation, the Commission's consistent view that a Title VII charge need not specify the evidentiary basis for its allegations should have been virtually conclusive. As this Court has noted, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidential Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 368. To paraphrase the opinion in *Occidental Life*, "[i]n view of the

federal policy requiring employment discrimination claims to be investigated by the [Commission] and, whenever possible, administratively resolved before suit is brought in federal court, it is hardly appropriate [to shift the determination of whether an initial charging document is sufficient from the Commission to the federal courts]." *Ibid.* The court of appeals accordingly erred in failing to defer to the Commission's construction of Section 706(b)'s requirements.

2. a. As originally enacted in 1964, Section 706(a) provided that a Commissioner's charge could be filed where a Commissioner of the EEOC had "reasonable cause to believe a violation of [Title VII] ha[d] occurred," and the charge "set[] forth the facts upon which it [was] based" (Pub. L. No. 88-352, 78 Stat. 259).[9] The wording of Section 706 essentially paralleled the provisions of Section 707(a), which even today authorizes the Attorney General to bring civil "pattern or practice" actions only where he has "reasonable cause to believe" that a "pattern or practice" of discrimination in violation of Title VII is occurring and the civil complaint "set[s] forth facts pertaining to such pattern or practice" (42 U.S.C. 2000e-6(a)).

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[9] The original version of Section 706 provided in pertinent part (Pub. L. No. 88-352, 78 Stat. 259):

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer * * * has engaged in an unlawful employment practice * * * the Commission shall furnish such employer * * * with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission.

Although the original version of Section 706 provided that a respondent would receive a copy of any charge filed by the Commission, the statute did not require that the charge be served within any particular time period.

The requirement that Commissioners' charges under Section 706 and civil complaints under Section 707 state the "facts" upon which they were based produced—quite predictably—a spate of early litigation. These cases, however, uniformly held that Title VII did not impose any specific factual pleading burden upon the Commission or the Attorney General. In *United States* v. *Gustin-Bacon Division, Certain-Teed Products Corp.*, 426 F.2d 539 (10th Cir. 1970), the court rejected the assertion that Section 707 imposed more onerous pleading burdens on the Attorney General than those required by the Federal Rules of Civil Procedure. The court searched the legislative history of Title VII and was "unable to find any expressed intent, clear or otherwise" to create "a requirement of detailed pleading" (426 F.2d at 543).[10] The Ninth Circuit relied on similar reasoning to reject the assertion that Section 706 "requir[es] a detailed statement of the underlying facts relative to the alleged acts of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d 237, 241 (1971). The court noted that Section 707 did not require detailed factual pleading and concluded "that to require the Commission to plead evidence in a [Section 706 charge] which is a step in an administrative investigation when the same language in the same statute does not require such specificity in a court action which seeks a judgment, would constitute topsy-turvy logic and we will not indulge in it" (439 F.2d at 243).

The subsequent decisions of other courts of appeals were in unanimous agreement with the Ninth Circuit's interpretation of Section 706. As the Fourth Circuit stated shortly after the decision in *Local 104*, "[t]he purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make

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[10] The *Gustin-Bacon* court noted that a " 'requirement that facts be pleaded is illusory and unsound; and results in a battle over the form of pleadings that does not advance the action to an adjudication of the merits' " (426 F.2d at 542, quoting 2A Moore's Federal Practice ¶ 8.12 at 1692).

out a prima facie case. • • • [S]ection 706(a) only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged." *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 38.[11] Accord, *Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799 (6th Cir.), cert. denied, 400 U.S. 942 (1970); *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d 160 (5th Cir. 1975); *General Employment Enterprises, Inc.* v. *EEOC*, 440 F.2d 783 (7th Cir. 1971) (en banc); *Adolph Coors, Co.* v. *EEOC*, 464 F.2d 1270 (10th Cir. 1972), cert. denied, 410 U.S. 929 (1973); *Mountain States Telephone & Telegraph Co.* v. *EEOC*, 466 F.2d 541 (10th Cir. 1972); *Oklahoma Publishing Co.* v. *Powell*, 22 Fair Empl. Prac. Cas. (BNA) 1419 (1975) and 22 Fair Empl. Prac. Cas. (BNA) 1429 (10th Cir. 1978). The courts of appeals, therefore, uniformly upheld Title VII charges against attack on sufficiency grounds. Specifically, prior to the decision below, no court of appeals ever refused to enforce an EEOC investigatory subpoena on the ground that the administrative charge failed to specify its "factual basis" (Pet. App. 14a). On the contrary, the courts consistently enforced subpoenas based on charges that are no more specific factually than the one found deficient below.[12]

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[11] The *Graniteville* court recognized that if Section 706 required specific factual pleading, "charges initiating EEOC investigations would be held to a significantly higher standard than complaints filed in federal court by the Attorney General in Title VII civil actions" (438 F.2d at 39). Such a result, the court concluded, was "too great an anomaly to be attributed to Congress" (*ibid.*).

[12] See, *e.g.*, *Sparton Southwest, Inc.* v. *EEOC*, 461 F.2d 1055, 1058 (10th Cir. 1971) (charge alleges that "[r]espondent discriminatorily fails and/or refuses to recruit and/or hire Negroes, Indians and Spanish-Surnamed Americans in the same manner it recruits and/or hires Anglos"); *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 783 (commissioner's charge alleges that employer violates Title VII by "discriminatorily failing or refusing to hire Negroes and Jewish people"); *Bowaters Southern Paper Corp.* v.

b. Respondent argues that the above precedent is irrelevant to the interpretation of the current version of Section 706 (Resp. Br. In Opp. 19-20), and suggests that the 1972 amendments to Title VII significantly increased the pleading burden imposed upon the Commission by Section 706 (Resp. Br. In Opp. 21). We disagree.

The 1972 amendments to Title VII made two changes in Section 706 that are relevant to the present inquiry. First, the amendments eliminated the requirement that commissioners' charges be supported by reasonable cause. Instead, commissioners' charges, like the charges of any aggrieved complainant, must be in writing, under oath, and "contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)). Second, instead of explicating the "facts" upon which a charge is based, the Commission is required to "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" upon the respondent within 10 days (*ibid.*). See *EEOC* v. *Dean*

EEOC, *supra*, 428 F.2d at 800 (commissioner's charge alleges that employer "has engaged in the following unlawful employment practices: 1. Maintenance of racially restricted job classifications. 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs. 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs"); *New Orleans Public Service, Inc.* v. *Brown*, *supra*, 507 F.2d at 163-164 (charge quotes statistics to support allegation that "[r]espondent employer discriminatorily refuses or fails to recruit and hire Negroes, Spanish Surnamed Americans, Jews and females in the same manner it recruits and hires Caucasians," but court explicitly notes that charge would be sufficient "even without the statistical information which this charge contains"); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 34 n.1 (charge alleges that "Negroes are hired to the traditional Negro jobs and regardless of length of service, Negroes are not promoted or considered for better jobs as are the white employees"). These decisions implicitly recognize that a commissioner may, within his or her discretion, include underlying factual details in a charge. The charge, however, is valid so long as notice is given of the alleged unlawful practices. See, *e.g.*, *New Orleans Public Service, Inc.* v. *Brown*, *supra*, 507 F.2d at 163-164.

Witter Co., 643 F.2d 1334, 1337 (9th Cir. 1980). Nothing in either of these alterations to Section 706 suggests that Congress has sub silentio imposed a factual pleading requirement upon the Commission.

The legislative history of the 1972 amendments does not indicate that Congress intended to intensify the sufficiency requirements for a commissioner's charge under Section 706. Indeed, the 1972 amendments were designed, in large part, to increase the investigative and enforcement powers of the Commission. See generally *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 358-373.[13] At the time of those amendments, four circuits had concluded that Section 706 charges need only describe the alleged discriminatory conduct in general terms. *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243; *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800; *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784; *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 37-39. However, rather than continuing or strengthening the requirement that a commissioner's charge set forth "the facts upon which it is based" (Pub. L. No. 88-352, Section 706(a), 78 Stat. 259), Congress eliminated any factual pleading requirement entirely, substituting instead the notice provisions of Section 706(b). Congress, furthermore, expressly left the form and content of Section 706(b) charges to Commission discretion. *Ibid.* Congress, therefore, has plainly rejected any requirement that a Commissioner's charge set forth its underlying factual basis.[14]

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[13] Respondent's contention (Resp. Br. In Opp. 16-19) that the Commission lacks authority to investigate its employment practices therefore proceeds on a particularly weak foundation. See *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. In any event, as we have noted earlier, this issue is not properly before the Court. Pet. Reply Br. 9.

[14] Congress' undoubted awareness of the preamendment decisions rejecting the interpretation of Section 706 adopted by the court

The court of appeals did not discuss the legislative history outlined above. Instead, the court concluded that the notice provisions of amended Section 706(b) require the Commission to explicate the factual basis for an administrative charge (Pet. App. 6a-7a). But those notice provisions, properly construed, do not support the decision below.

Although the original version of Section 706 required service of the charge upon the respondent, prior to the 1972 amendments the section did not require service within any particular time period. To protect the charging party from reprisal, moreover, the Commission routinely delayed serving a copy of the charge until an EEOC officer was available to begin investigating the charge's allegations. See *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972). Both the House and the Senate sought to alter this practice by requiring that a respondent be notified of a charge within a limited time period. See "Comparison of Title VII, as proposed to be amended by S. 2515 and H.R. 1746," 118 Cong. Rec. 300 (1972). The House proposal would have required service of the charge itself within five days of its filing. The Senate bill, however, which was eventually adopted by both houses, required service within 10 days of a "notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" (118 Cong. Rec. 300 (1972)).

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below underscores its failure to impose a factual pleading requirement upon Section 706(b). See *e.g.*, *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243. Congress' failure to act in the light of these decisions, while making other changes to the Act, indicates congressional approval. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 (1981); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also Section by Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972) ("In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII").

There is no indication that Section 706(b)'s notice provisions were designed to impose a stringent pleading standard on the Commission. As this Court has noted, Congress' concern in amending Section 706(b) "was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 371. Congress took the view that the Commission's previous notification procedures, under which a respondent might not receive notice of a pending charge for a significant period of time, unduly prejudiced the rights of employers. The notice provisions of Section 706(b), therefore, were drafted "to accord respondents fair notice that charges are pending against them" (118 Cong. Rec. 4941 (1972)). Contrary to the conclusion of the court below, the legislative purpose behind the notice provisions of Section 706(b) is precise and well-defined: Congress amended Section 706(b) to provide "prompt notification" to alleged violators (*Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 371). There is no evidence in the 1972 legislative history that Congress, by enacting a summary notice requirement and deleting a provision for service of the charge itself, intended to alter the well-established view that generally worded charges are sufficient under Title VII.

Except for the court below, every court of appeals that has considered the question has rejected the argument that the 1972 amendments to Section 706 create a detailed evidentiary pleading requirement for commissioners' charges. *EEOC* v. *Dean Witter Co.*, *supra*; *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982). These decisions, like the earlier cases described above, recognize that Section 706(b) "impose[s] no strict * * * pleading requirement upon complainants, whether they be private parties or the Commissioners of the EEOC." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

In *Dean Witter*, the district court had refused to enforce a Commission subpoena on the ground that the

charge "failed to set forth the date, place, and circumstances of the charge as required by statute" (643 F.2d at 1336). Although the court of appeals concluded that the charge in that case did not adequately apprise the respondent of the date of its alleged misconduct, the court rejected any claim that amended Section 706 imposes a special pleading burden on the Commission. "We do not read the inclusion of the date, place and circumstances requirement as imposing onerous new pleading requirements upon the Commission" (643 F.2d at 1337). Specifically, the court concluded that the Commission's duty to provide a respondent with " 'the circumstances' of the alleged unlawful practice" does not create "a more burdensome requirement than the 'fact' pleading requirement of former § 706(a)," with the result that "our decision in *Local 104, Sheet Metal Workers* continues to provide the controlling principles to guide the form of EEOC charges" (643 F.2d at 1337, 1338). "The charge is merely the first step in the administrative process, and it would defeat the Congressional scheme to impose detailed fact pleading burdens on the EEOC before it has had an opportunity to investigate the basis for the charge" (*id.* at 1338). The court therefore held that a charge alleging "company-wide" discrimination is sufficient to meet the "place" requirement of Section 706(b) and a "listing of the nature of the alleged employment practices, even though essentially conclusory in nature, [is] sufficient to comply with the 'circumstances' requirement" (*id.* at 1337).[16] Significantly, the charge in *Dean Witter*, like the charge in this case, set forth the alleged

[16] The court sustained the district court's refusal to enforce the Commission's investigatory subpoena on the ground that the charge did not disclose whether the alleged illegal practices "occurred in the past, or at least, when they began in the past" (643 F.2d at 1338). Following the *Dean Witter* decision, and as demonstrated by the present case, the Commission has amended many outstanding "pattern or practice" charges to include "a good faith estimate of the probable time periods [involved]" (643 F.2d at 1338). See *infra*, pages 26-31.

unlawful practices in general terms without any supporting "factual basis" (Pet. App. 9a, 14a).[16]

In *EEOC* v. *K-Mart Corp.*, *supra*, the Sixth Circuit issued a writ of mandamus to vacate an order of the district court that allowed K-Mart to depose a Commissioner of the EEOC and other Commission employees.[17] The appellate court examined the language and legislative history of Section 706 and concluded that "[n]othing in Title VII * * * authorizes a district court in a subpoena enforcement proceeding to allow discovery concerning the facts underlying a charge of discrimination" (694 F.2d at 1065). The court specifically disagreed with the holding in the present case that "section 706(b) re-

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[16] The charge in *Dean Witter* alleged that the employer had discriminated against Blacks, women, Spanish-surnamed Americans and other minorities on the basis of race, sex, and national origin by policies that included but were not limited to (643 F.2d at 1336 n.1):

> 1. Refusing to recruit and hire Blacks, women, Spanish-surnamed Americans and other minorities in the same manner and on the same basis in which white males have been recruited and hired;
>
> 2. Discriminatorily assigning and limiting Blacks, women, Spanish-surnamed Americans and other minorities to positions with lower pay and less opportunity for advancement than those to which white males have been assigned and hired;
>
> 3. Refusing to provide training and promotion opportunities for Blacks, women, Spanish-surnamed Americans and other minorities in the same manner in which such opportunities have been provided white males;
>
> 4. Discriminatorily subjecting Blacks, women, Spanish-surnamed Americans and other minorities to different terms and conditions of employment, including leave, benefits, and standards for disciplinary actions and terminations, than those which are applied in the case of white males.

[17] K-Mart obtained the discovery order during the course of a subpoena enforcement proceeding opposed by the company on grounds virtually identical to those advanced by the respondent here. 694 F.2d at 1058-1059.

quires 'some basis in fact'" (*id.* at 1063 n.7). The court noted that such a requirement "is contrary to well-established law" (*ibid.*).

Thus, as Chief Judge Lay noted in dissenting to the denial of rehearing en banc, the decision below is "in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a Title VII charge" (Pet. App. 35a). Section 706, as originally enacted, did not require the Commission to provide the "factual basis" found necessary below (Pet. App. 14), and nothing in the 1972 amendments to Title VII alters that result.

B. The Date Provided by the Amended Charge Fully Satisfies the Notice Provisions of Section 706(b)

The charge in this case, as originally filed, alleged that respondent had engaged in continuing misconduct, but did not include a specific beginning date for the unlawful employment practices delineated by Commissioner Norton (Pet. App. 44a-45a). Following the Ninth Circuit's decision in *Dean Witter Co.*, *supra*, the charge was amended by Commissioner Norton to allege that respondent had engaged in the identified practices "on a continuing basis from at least July 2, 1965, until the present" (Pet. App. 47a). The court of appeals, however, concluded that specification of July 2, 1965, as the beginning date of respondent's alleged misconduct was insufficient to provide the notice required by Section 706 because it lacked a "factual basis" and did not notify respondent "of the parameters of the investigation" (Pet. App. 11a-12a). Neither objection is sound.

1. The Commission, at the very threshold of its inquiry into an employer's allegedly discriminatory practices, cannot be required to provide the precise date that a pattern or practice of discrimination began. As the Ninth Circuit has concluded, Section 706(b) does not mandate more than a "good faith estimate of the probable time periods" involved. *EEOC* v. *Dean Witter Co.*,

supra, 643 F.2d at 1338.[18] Such an estimate, moreover, was plainly given in Commisisoner Norton's amended charge.

The charge lodged by Commissioner Norton described a broad pattern or practice of discrimination affecting all black and female employees in several job categories. Unlike an individual complaint arising from a specific incident on a given date, a pattern or practice charge is based on the aggregate of many individual employment decisions over a period of time. Such a pattern or practice seldom, if ever, has a discrete beginning date. Indeed, the theory behind such a charge is that nondiscriminatory employment practices will, over the course of time, result in a workforce whose composition approximates that of the available labor force, while discriminatory practices will result in substantial disparities between the two figures. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977). Positing a precise beginning date for discriminatory conduct when such statistical disparities arise is, at best, conjectural. The difficulties are compounded when the time frame must be estimated at

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[18] In *EEOC* v. *Dean Witter Co.*, *supra*, the Ninth Circuit refused to enforce a Commission subpoena because the Commissioners' charge upon which it was based did not disclose whether the alleged unlawful employment practices "occurred in the past, or at least, when they began in the past" (643 F.2d at 1338). The court, however, did not insist upon a "factual basis" for the beginning date of the conduct described in a Section 706(b) charge. The court emphasized that it was not imposing "strict technical pleading requirement[s]" upon the Commission or other complainants (643 F.2d at 1338). Because the "filing of a charge is the first step in the EEOC administrative process, and understandably, the EEOC may be uncertain about the temporal scope of the challenged practices," the court concluded that "a good faith estimate of the probable time periods should be sufficient" to meet the requirements of Section 706(b) (643 F.2d at 1338). That result should especially obtain, the court noted, "where a pattern or practice charge is involved" (*ibid.*).

the charging stage of a Commission proceeding, before the Commission has had the opportunity to investigate the possible underlying causes of any statistical disparity.[19]

The Commission has not, as respondent alleges, utilized the effective date of Title VII as "boilerplate" in all outstanding pattern or practice charges (Resp. Br. In Opp. 12 n.7).[20] Rather, the Commission has carefully considered the evidence in each case in arriving at an appropriate starting date for the charged misconduct. The Commission has generally limited the use of July 2, 1965, to those cases where special circumstances indicate a history of assignment or promotion discrimination that has been continued or perpetuated by collective bargaining agreements. Specification of the effective date of Title VII as the beginning date of the charged discrimination is appropriate in such cases in order to facilitate seniority relief to the full extent permitted by law.

Commissioner Norton considered an amendment to the effective date of Title VII appropriate in this case because

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[19] It was precisely because of these difficulties that the Commission, prior to the decision in *Dean Witter*, considered that its notice obligations under Section 706(b) were fulfilled by providing in a pattern or practice charge that the alleged misconduct was of a continuing nature. Following *Dean Witter*, however, the Commission has sought to amend outstanding pattern or practice charges to specify a beginning date for the charged discrimination. But see *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (questioning whether Section 706(b) requires a charge to specify a beginning date, apart from the date of the charge itself).

[20] Respondent appears to have assumed that the Commission has a policy of amending all outstanding charges to include July 2, 1965, as the beginning date for the charged discrimination because that date was utilized in the charge at issue in *EEOC* v. *K-Mart Corp.*, *supra*. That assumption is completely unfounded. Of 139 outstanding systemic commissioners' charges being handled through the Office of Systemic Programs, only 19 have been amended to reflect the July 2, 1965, date as the beginning of the charged discrimination. This practice refutes any suggestion that July 2, 1965, is inserted as "boilerplate" into "every case" (Resp. Br. In Opp. 12 n.7) without reference to the special circumstances of each charge.

respondent's statistical record indicated a pattern or practice of confining women to office/clerical positions and of confining Blacks to operative and laborer positions. Because respondent has been hiring women and Blacks into this allegedly discriminatory system since the effective date of Title VII, Commissioner Norton's use of July 2, 1965, in her amended charge is an entirely reasonable and good-faith estimate of the probable time period of respondent's misconduct.[21] *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. The court of appeals erred in requiring a more specific "factual basis" for the date utilized by Commissioner Norton.

2. The court below held that Commissioner Norton's use of July 2, 1965, lacked not only a "factual basis," but also failed to give "notice to the employer of the parameters of the investigation" (Pet. App. 11a). Cf. *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1063 (the effective date of Title VII "does not give the employer, the district court, or the EEOC's investigators any objective basis to determine the temporal scope of the investigation").[22]

This objection is unsound because neither the scope of the Commission's investigation nor the scope of an enforcement action is limited by the form or content of a charge under Section 706(b). "Any violations that the

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[21] This case is unusual, in that respondent has actually supplied the Commission with statistical data extending to the effective date of Title VII; its first EEO-1 report was filed with the Commission in April 1966. That first EEO-1 report contains a description of respondent's total employment statistics for the Wood River Refinery as of February 25, 1965.

[22] The Sixth Circuit's suggestion in *EEOC* v. *K-Mart Corp.*, *supra*, that the Commission's use of the effective date of Title VII does not satisfy the date requirement of Section 706(b) may well have been influenced by the district court's finding that the Commission "had a policy of inserting pro-forma the effective date of Title VII" into commissioners' charges (694 F.2d at 1063). As shown above (note 20), however, the Commission has no such policy.

EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). Although Section 706(b) charges are a condition precedent to agency action under Title VII, they, like their counterpart charges under the National Labor Relations Act, do not limit the scope of any subsequent findings of reasonable cause by the Commission, nor do they define the limits of a resulting Commission enforcement action. Their "purpose is merely to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959).[23] As respondent concedes, "[t]he charge does not * * * reduce the ability of the Commission to expand the scope of its investigation" (Resp. Br. In Opp. 27). In short, because a Section 706(b) charge does not define the limits of a Commission investigation, conciliation action, or subsequent prosecution, the court below erred in refusing to enforce the Commission's subpoena on the ground that Commissioner Norton's charge failed to set such limits.

"Since a Commissioner's charge does no more than initiate administrative fact finding and * * * conciliation," there is no sound basis for requiring the Commission to provide a specific, factually supported beginning date for the misconduct alleged in a charge. *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784. The charge in this case notified respondent that Commissioner Norton had reason to believe that the company had engaged in specified misconduct since at least July 2, 1965. The company, therefore, was given a clear indication of the temporal and substantive scope of its alleged mis-

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[23] The National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, which served as the remedial model for Title VII, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366 (1977), has often guided courts in construing Title VII. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-804 (1973); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-769 (1976).

conduct. The fact that the temporal boundaries of that misconduct are broad is not a valid ground for objection; the Commission is clearly entitled to investigate misconduct since the effective date of Title VII.[24] Because respondent cannot legitimately complain of a lack of notice regarding the temporal scope of its alleged misconduct, the company's probable concern with the date provided in Commissioner Norton's charge is that it indicates a far-reaching Commission investigation of its employment practices. Any such concern, however, did not justify the lower court's refusal to enforce the Commission's subpoena, which sought information only for the period 1976 to 1980.[25]

Respondent has received all the notice that Section 706(b) requires—a concise statement of what it has allegedly done in violation of Title VII of the Civil Rights Act of 1964. See *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 372-373 & n.32. The "date" and "circumstances" requirements of Section 706(b) do not require the technical precision respondent would impose on the Commission prior to the agency's investigation. The respondent is of course entitled to argue to the Commission that it did not commit the described unlawful acts in the time period charged in this case. Respondent, however, may not claim that it does not know what it is charged with doing.

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[24] Indeed, the Commission may properly investigate employment practices even before the effective date of Title VII. Past discrimination, even if not legally cognizable, may establish a pattern or practice of discrimination or show the motive or intent behind present practices. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977).

[25] There is no substance to the assertion that July 2, 1965, is insufficient as a matter of law to provide an employer with notice of the beginning date of its discriminatory practices (Resp. Br. In Opp. 12-15). If accepted, the argument would mean that the worst offender under Title VII—the employer that had never acted to integrate its segregated workforce after the passage of Title VII—could not be accurately charged under the Act simply because of the extent of its discrimination.

II. THE REASONS GIVEN BY THE COURT OF APPEALS FOR REJECTING THE COMMISSION'S INTERPRETATION OF SECTION 706(b) ARE UNPERSUASIVE

The court of appeals reasoned that commissioner's charges must be supported by an articulated "factual basis" in order to "enable[] the parties to determine whether conciliation is an appropriate remedy and aid[] the court and the employer in determining what evidence is relevant for discovery" (Pet. App. 12a). The court further stated that a charge "without some factual or statistical basis gives the appearance of a 'fishing expedition' and fails to give the employer sufficient notice" (*ibid.*). These grounds for the decision below, however, do not withstand scrutiny. The scope of a subpoena enforcement action is decidedly limited and does not extend to such inquiries as "whether conciliation is an appropriate remedy" (Pet. App. 12a). The level of notice mandated by the court below, moreover, is at odds with the limited function of a Section 706(b) charge and is not required to prevent abuse of authority. Finally, any concern that a generally worded commissioner's charge would permit an unwarranted "fishing expedition" is largely illusory.

A. There Is No Need for the Commission to Specify the Factual Basis for a Section 706(b) Charge in Order to Obtain Enforcement of an Investigative Subpoena

The court of appeals suggested that the factual basis for a commissioner's charge must be provided to enable the parties to determine the applicability of certain remedies (Pet. App. 12a) and to "protect the employer from an open-ended investigation" (*id.* at 11a). The factual pleading requirement fashioned by the court of appeals, however, goes far beyond the narrow range of issues legitimately raised in a subpoena enforcement proceeding.

The district court's inquiry in a subpoena enforcement action is "extremely limited." *NLRB* v. *Fredrick Cowan*

& *Co.*, 522 F.2d 26, 28 (2d Cir. 1975); *NLRB* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 n.2 (9th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 308-309 (7th Cir. 1981). This Court has established that, in general, administrative subpoenas should be enforced by the federal courts "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *Powell*, 379 U.S. 48, 57 (1964). While a Section 706(b) charge is a prerequisite to an EEOC investigation, "[r]easonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued." *EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977). Accord, *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066; *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. "Rather, it is the function of such investigative subpoenas to establish whether reasonable cause to bring a discrimination charge exists." *EEOC* v. *Chrysler Corp.*, *supra*, 567 F.2d at 755. A district court requested to enforce a Commission subpoena, therefore, is "limited to determining whether the subpoenaed information is material and relevant to the investigation of a potential violation" (*ibid.*).[26] A subpoena enforcement proceeding is not a forum for " 'a general inquiry into the sufficiency of the evidence supporting a charge.' " *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. Questions regarding the existence

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[26] See also *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065 (Title VII "restrict[s] the district court's inquiry in subpoena enforcement actions to whether the information sought is material and relevant"); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36 (the standard to be applied in subpoena enforcement proceedings "is one of relevancy and materiality, not one of reasonable cause to believe the charge is true").

of reasonable cause and the appropriateness of particular remedies "must await the completion of the administrative process before the district court may properly review them." *EEOC* v. *Chrysler Corp.*, *supra*, 567 F.2d at 755.[27]

The court of appeals' decision disregards the limited nature of an EEOC subpoena enforcement proceeding. An investigatory subpoena is issued as part of an administrative inquiry into whether there is reasonable cause to believe that a charge lodged under Section 706 (b) is true. 42 U.S.C. 2000e-5(b). The net effect of the lower court's factual pleading requirement, however, is to "require the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause" (Pet. App. 38a; Lay, C.J., dissenting from denial of rehearing en banc). Indeed, the Sixth Circuit rejected the opinion below as "contrary to well-established law" precisely because "[i]n subpoena enforcement proceedings, the EEOC usually does not have to prove probable cause or reasonable cause to believe that a charge of discrimination is true." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1063 n.7. Because such a pleading requirement would necessarily entangle federal district courts in second-guessing the factual sufficiency of charges filed by the Commission, the decision below "place[s] the cart before the horse," and "substitute[s]

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[27] Neither the charge itself, nor the notice of the charge provided by Section 706(b), were designed by Congress to "enable[] the parties to determine whether conciliation is an appropriate remedy" (Pet. App. 12a). That determination must await the conclusion of the Commission's investigation and even then is contingent upon a finding of reasonable cause. 42 U.S.C. 2000e-5(b). As this Court stated in *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) (footnote omitted), disclosure by the Commission to the charging party of information developed in the course of the Commission's investigation is authorized precisely because such "disclosure enhances the Commission's ability to carry out its statutory responsibility to resolve charges through informal conciliation and negotiation: A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."

a different driver for the one appointed by Congress." *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. Such broad-scale expansion of the issues to be determined in summary subpoena enforcement actions should not be countenanced by this Court.[28]

B. The Commission's Practice of Issuing Generally Worded Charges Provides Adequate Notice and Does Not Result In Abuse of Commission Authority

1. Respondent argues that Section 706(b) requires the Commission to provide it with a "statement of the specific incidents or employment practices alleged to be discriminatory" (Resp. Br. In Opp. 12). The record in this case, however, shows that respondent has received just such a statement.

The charge in this case notified the respondent that a Commissioner of the EEOC had reason to believe that the company had excluded blacks from "managerial, professional, technical, office-clerical, craft, and service workers positions," and had confined women to office and clerical positions (Pet. App. 44a). The charge, as amended, informed the respondent that the Commission had reason to believe that the company "had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present" (*id.* at 47a). The statistics upon which the charge was based, moreover, were provided by the respondent itself.[29]

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[28] Traditional subpoena enforcement procedures are fully sufficient to protect against overly expansive administrative inquiries (Pet. App. 11a). In examining whether "the information sought [by a Commission subpoena] is material and relevant" (*EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065), a district court may properly consider whether a subpoena is indefinite or unduly burdensome. *EEOC* v. *Bay Shipbuilding Corp.*, *supra*, 668 F.2d at 308-310. Cf. *United States* v. *Powell*, *supra*, 379 U.S. at 58.

[29] Published Commission guidelines put respondents on notice that Commissioners' charges are based on an analysis of "EEO reporting data" (Pet. App. 41a-42a). Contrary to the conclusion of the court of appeals, therefore, there is little practical need to provide respondents with "notice" of the statistical data upon

Thus, the charge clearly informed respondent of the substance of the allegations against it. Unless the Commission must present its proof along with its charge, it is difficult to see how additional "facts" would provide more "notice" to respondent at the very outset of this proceeding. Indeed, as the Sixth Circuit has noted, "it is difficult to see what additional information the Commissioner should set forth as facts supporting [her] charge." *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800.[30]

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which commissioners' charges are based (Pet. App. 11a n.5); respondents already have such reporting data in their possession. The record in this case demonstrates that the respondent was well aware that its EEO-1 reports supplied the basis for Commissioner Norton's charge. See J.A. 92, 157.

[30] The Commission has provided the Court with the statistical breakdown by job classification of the Wood River Refinery for the years 1970-1978 (Pet. Reply Br. 4-5). The Commission supplied these data in response to respondent's reliance on misleading aggregate employment statistics (Resp. Br. In Opp. 14, 17 n.12) and to counter respondent's suggestion that the systemic enforcement program is somehow irregular in that it does not rely on "specific evidence of discrimination" (*id.* at 2; see also *id.* at 11).

Analyzed by job category, the statistical data provided by respondent's EEO-1 reports for the nine years preceding the charge show the complete exclusion of women from its managerial staff of over 230, despite an availability in 1978 of 16.9% women in the St. Louis Standard Metropolitan Statistical Area (SMSA) (Pet. Reply Br. 4-5). The data also show gross underrepresentation of women in every other job category except office/clerical. In 1978, for example, respondent employed one woman in its force of 763 craft workers despite 7.8% female SMSA availability in this job category; one woman in 22 service workers (56.7% female availability); one woman in 84 technical workers (39.6% availability) and 23 women in 422 operative and laborer workers (24.3% availability).

Blacks fared little better. In 1978, one black was employed in a managerial staff of 238, contrasted with 4.3% black SMSA availability in that year. The EEO-1 reports disclose that in 1978 respondent employed 19 blacks in its force of 763 craft workers compared with 8.2% black SMSA availability; one black in 22 service workers (30.1% black SMSA availability); and 3 blacks

Respondent's "notice" arguments are unpersuasive for another important reason. The commissioner's charge in this case clearly indicated the parties involved, identified the location of the putative discriminatory activities, and alleged that the respondent had confined its women employees in office and clerical positions and its black employees in operative and laborer positions from at least the effective date of Title VII. Since such allegations would certainly be sufficient to provide notice in a complaint brought by the Commission in federal court after a finding of reasonable cause, it would be highly anomalous to require the Commission to plead the evidence supporting its allegations at the threshold of its administrative investigation. Although the respondent argues that "a charge under Title VII is not to be compared to a complaint under the Federal Rules of Civil Procedure" (Resp. Br. In Opp. 27), there is certainly no reason to impose on Section 706(b) charges "a standard even more strict than that required by our Rules of Civil Procedure, notwithstanding that the pleadings are even less significant in the administrative process than in the judicial." *Sparton Southwest, Inc.* v. *EEOC*, *supra*, 461 F.2d at 1059. Accord, *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1337; *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 243; *Graniteville Co. (Sibley Division)* v.

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in 84 technical workers (13.2% SMSA availability). Blacks were also underrepresented as office/clerical workers, constituting 9 of 96 in 1978 at their highest level in 9 years (12.1% SMSA black availability), and, except for 1976 and 1978, were similarly underrepresented in the professional worker category (Pet. Reply Br. 4-5).

The Commission did not introduce these data below because of its position, to which it adheres, that it is not required to provide such information in order to obtain enforcement of a subpoena issued pursuant to a commissioner's charge. A subpoena enforcement action should not become, as this one has, a "mini-trial" on the merits of the administrative charge, with the respondent attacking the merits of the charge (Resp. Br. In Opp. 3-5) and requesting discovery to ascertain the "validity" of the charge (*id.* at 19; see also *id.* at 5, 9, 17 n.12).

EEOC, *supra*, 438 F.2d at 39 & n.7; *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784. The extensive "notice" requirements imposed by the court below, therefore, are "inconsistent with the enforcement scheme of Title VII." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1067.

2. The factual pleading requirements imposed below are necessary, respondent asserts, to prevent "abuse of governmental power" (Resp. Br. In Opp. 17). Congress, however, has specifically provided the means of safeguarding Title VII respondents from an errant bureaucracy by requiring that commissioner's charges be under oath—there is no need for the federal courts to erect additional barricades. *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338; *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065 & n.12.

The contention that Title VII demands factually specific allegations to prevent the filing of irresponsible charges is hardly novel; indeed, it was raised in some of the earliest EEOC subpoena enforcement cases. In *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 39, the district court had refused to enforce a Commission subpoena because "Congress intended to deny the Commission the broad investigatory powers of other federal agencies and to carefully circumscribe its authority of investigation." The Fourth Circuit, however, flatly rejected this conclusion. After an extensive examination of the legislative history of Title VII (438 F.2d at 39-41), the court of appeals found that the Commission's investigatory powers were not narrowly confined (*id.* at 41). The court, moreover, concluded that a factual pleading requirement was not necessary to prevent "abuse of authority" (Resp. Br. In Opp. 15). "Congress sought to control mere 'fishing expeditions' by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner with sufficient prior information to have reasonable cause to believe that a statutory violation had occurred" (438 F.2d at 41). The

Ninth Circuit, in an opinion published just a few weeks later, reached the same conclusion for virtually identical reasons. *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

As explained earlier, Congress amended Section 706(a) subsequent to the above decisions, eliminating the requirement that a commissioner's charge be supported by "reasonable cause to believe a violation of [Title VII] has occurred" (Pub. L. No. 88-352, 78 Stat. 259). Instead, Congress provided that Commissioner's charges shall be under oath. 42 U.S.C. 2000e-5(b). The substitution of an oath for a reasonable cause requirement, however, can hardly be viewed as diluting the *Graniteville* and *Local 104* court's conclusions regarding the necessity of factual pleading to avert capricious governmental action.

In *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338, the respondent to a Commission subpoena renewed the argument that the EEOC has "limited investigatory powers" and must therefore file "detailed and specific" charges to avoid abuse of its authority. The Ninth Circuit, as it had in *Local 104*, rejected the argument. The court observed that the 1972 amendments to Title VII were designed to "strengthen the investigatory power of the EEOC" (643 F.2d at 1338). In these circumstances, the court noted, the respondent's argument "has even less force * * * than it did in 1971" (*ibid.*). The court concluded that Section 706(b) does not require the Commission to draft detailed factual pleadings for final approval by a federal court. "[T]he good faith of high level government officials [is] a sufficient check on the filing of irresponsible charges" (643 F.2d at 1338). Accord, *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065.

C. Any Concern that Generally Worded Charges Lead to Improper "Fishing Expeditions" is Insubstantial

The court of appeals concluded that, "without some factual or statistical basis," a Section 706(b) charge "gives the appearance of a fishing expedition" (Pet.

App. 12a). The Commission's incipient investigation into respondent's allegedly unlawful employment practices, however, should not fall before the "colorful and nostalgic slogan 'no fishing expeditions'" (*United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642).

This Court has noted that "fishing expedition" objections carry little force in the context of administrative investigations. In *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642, the Court wrote that, although courts may not "go fishing," administrative agencies are not so strictly limited. In addition to judicial functions, administrative agencies are "charged with seeing that the laws are enforced," and they may therefore "exercise powers of original inquiry" (*ibid.*). "When investigative and accusatory duties are delegated by statute to an administrative body, it * * * may take steps to inform itself as to whether there is probable violation of the law" (*id.* at 643). "Fishing expedition" objections to administrative investigations, therefore, must be viewed with some skepticism because "[t]he only power that is involved * * * is the power to get information from those who best can give it and who are most interested in not doing so" (*id.* at 642). Respondent's construction of a "fishing expedition" argument upon the parenthetical notice provisions of Section 706(b) is particularly unpersuasive. "[I]t would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field * * * and then, by a parenthetical clause, disable it from normal and effective investigation." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

"It is well settled that the investigatory powers of the EEOC should be interpreted broadly." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066. Accord, *EEOC* v. *University of Pittsburgh*, 643 F.2d 983 (3d Cir.), cert. denied, 454 U.S. 880 (1981); *EEOC* v. *University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Motorola, Inc.* v. *McLain*, 484 F.2d 1339 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *EEOC* v. *Cambridge Tile*

Manufacturing Co., 590 F.2d 205 (6th Cir. 1979). Sections 709(a) and 710 of Title VII authorize the Commission to issue subpoenas following the filing of a charge under Section 706 (42 U.S.C. 2000e-5, 2000e-8(a), 2000e-9), and, as explained above, the Commission does not have to establish reasonable cause to believe that the charge is true—*i.e.*, explicate its "factual basis" (Pet. App. 14a)—in order to obtain enforcement of those subpoenas. Respondent, by its vigorous assertion that the charge in this case had "no purpose other than the initiation of a fishing expedition by [the Commission]" (Resp. Br. In Opp. 23), persuaded the court below that Section 706(b) required "a detailed statement of the underlying facts relative to the alleged acts of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241. But, as the Ninth Circuit correctly noted, that interpretation of Section 706 would mean "that the Commission, in its investigation, must not ask any questions to which it does not already know the answers." *Ibid.* Such a result, like the phrase "fishing expedition" itself, "has about it the aura of another, and bygone, legal era." *Ibid.* See also *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36; *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338; *New Orleans Public Services, Inc.* v. *Brown*, *supra*, 507 F.2d at 162 n.2, 164.

III. THE DECISION BELOW RESULTS IN AN UNWARRANTED INTRUSION UPON AN ADMINISTRATIVE PROCEEDING AT ITS VERY OUTSET

Although the court of appeals couched its decision in terms of "notice" (Pet. App. 12a), the pleading requirement created by the court goes far beyond any generally recognized concept of notice. By mandating that the Commission disclose the evidence underlying a Section 706(b) charge, the court has imposed a significant limitation on the Commission's administrative discretion. Under the decision below, the federal district courts—not the EEOC—would become the final arbiters of whether the information in the Commission's possession

justifies the issuance of a charge and the commencement of an administrative investigation. Respondents to Section 706(b) charges would reflexively challenge the Commission to demonstrate the "facts" supporting a proposed investigation of their employment practices and, like the respondent here, would request depositions of commissioners and other EEOC staff members to inquire into the "factual basis" and "validity" of pending discrimination charges. See, *e.g.*, Resp. Br. In Opp. 5, 9, 19. The end result would be that the investigator would become the investigated, and the orderly processing of discrimination claims under Title VII would grind to a halt.[31]

The court of appeals' interruption of the Commission's investigation into respondent's employment practices should not be countenanced. The court below has stymied an administrative investigation because of the purported insufficiency of an administrative charge. That result is clearly contrary to the Court's emphatic holding in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"), that federal courts may not intrude upon an administrative proceeding at its very outset.

In *Socal*, the Court held that the issuance of an administrative complaint by the Federal Trade Commission does not constitute final agency action reviewable under 5 U.S.C. 704. The statute at issue in *Socal* permitted issuance of an administrative complaint if the FTC had "reason to believe" that a violation of the law had occurred (449 U.S. at 234). The respondent in that case asserted, as did the respondent here (J.A. 157), that the FTC's complaint was invalid because the agency did not

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[31] The decision in this case will affect well over 100 pending commissioners' charges. The great majority of these charges, moreover, have been filed by commissioners who have served their terms and left the government. The legal and administrative difficulties created by the court of appeals' decision are therefore compounded by the fact that it is unclear whether a sitting commissioner can amend a charge to state what factual basis a former commissioner might have considered when issuing the charge.

have enough information to have "reason to believe" that the law had been violated (449 U.S. at 235, 237). The Court, however, concluded that, unlike the promulgation of administrative regulations, the issuance of an administrative complaint is not a final agency action subject to judicial review because a complaint merely represents "a threshold determination that further inquiry is warranted" (*id.* at 241). Review at the charging stage of an administrative proceeding, the Court stated, results in "interference with the proper functioning of the agency," "denies the agency an opportunity to correct its own mistakes" and "results in inefficient and perhaps unnecessary piecemeal review" (*id.* at 242).

Under the principles enunciated in *Socal*, Commissioner Norton's decision to initiate the administrative process in this case was well within her lawful discretion. Congress has charged the Commission with the responsibility to make the initial determination of whether unlawful employment practices exist (42 U.S.C. 2000e-5(b); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 35; *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 331-332 (4th Cir. 1977)), and federal courts should not probe the "factual basis" of Commission charges any more than they should second guess whether the FTC has properly issued an administrative complaint. See generally *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).

Like the administrative complaint at issue in *Socal*, Commissioner Norton's charge in this case "is not a definitive statement of position" (449 U.S. at 241); the charge has no dispositive effect on the rights, privileges, duties or liabilities of respondent.[32] A commissioner's charge has no "determinate consequences" (*ITT* v. *Local 134, IBEW*, 419 U.S. 428, 443 (1975)), and is therefore

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[32] Indeed, respondent admits that Commissioner Norton's charge does not require the company to do or refrain from doing anything: "The charge does not frame the issues in litigation, nor does it require an answer from the respondent" (Resp. Br. In Opp. 27).

not subject to routine judicial oversight, precisely because it is merely a preliminary step that signals the commencement of an agency investigation.[33] Review at the charging stage of an administrative proceeding, moreover, is particularly disruptive. As the facts of this case vividly demonstrate, judicial inquiries into the factual basis for an administrative charge interfere with the "proper functioning of the agency" and create a substantial "burden for the courts" (*Socal*, *supra*, 449 U.S. at 242). Judicial review at this point, furthermore, does not advance the ultimate aim of Title VII but rather "delay[s] resolution of the ultimate question whether the Act was violated" (*ibid.*). Such delay—occasioned by judicially imposed requirements regarding the content of commissioners' charges—is particularly unfortunate here, inasmuch as Section 706(b) expressly commits the form and content of all charges to the informed judgment of the Commission. 42 U.S.C. 2000e-5(b).

While the above considerations are by themselves sufficient to preclude judicial intervention at the pleading stage of administrative proceedings, there is yet another fundamental concern behind the Court's rejection in *Socal* of the position successfully advanced by the respondent below. Arguments going to the sufficiency of an agency's pleadings are hardly unique. "[E]very respondent to a Commission complaint could make the claim that [Shell] ha[s] made. Judicial review of the averments in the Commission's complaint should not be a means of turning prosecutor into defendant before adjudication concludes" (*Socal*, *supra*, 449 U.S. at 242-243). Were the rule

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[33] Even a finding of reasonable cause, made after an administrative investigation, is not final agency action reviewable in federal district court. A determination of reasonable cause merely requires the Commission to attempt to resolve the dispute by informal methods of conference, conciliation and persuasion—it does not fix any obligation or impose any duty on a respondent. *Georator Corp.* v. *EEOC*, 592 F.2d 765, 766 (4th Cir. 1979); *Francis-Sobel* v. *University of Maine*, 597 F.2d 15, 17 (1st Cir.), cert. denied, 444 U.S. 949 (1979).

otherwise, numerous administrative,[34] civil[35] and crimi-

[34] A great number of administrative agencies are authorized to act upon an administrative determination of "reasonable cause" or "reason to believe" a statutory violation exists. See, *e.g.*, 2 U.S.C. (Supp. V) 437g(a)(2) (Federal Election Commission); 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. (Supp. V) 87f-2(b) and (c) (Federal Grain Inspection Service); 7 U.S.C. 193, 213, 228a, 292, 1599(a), 2046 (Secretary of Agriculture); 12 U.S.C. (Supp. V) 1730a(h)(5)(A) (Federal Savings & Loan Insurance Corp.); 12 U.S.C. (Supp. V) 1844(e)(1) (Board of Governors of the Federal Reserve System); 15 U.S.C. 21(b) (Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Board, Federal Reserve Board and Federal Trade Commission); 15 U.S.C. (& Supp. V) 45, 57b-1(c)(1), 68e(b), 68h, 69g(b), 69i, 70f, 70i (Federal Trade Commission); 15 U.S.C. 77j(b), 80a-26(d) (Securities and Exchange Commission); 15 U.S.C. 1195(a) (Consumer Product Safety Commission); 15 U.S.C. 522 (Secretary of Commerce); 15 U.S.C. (Supp. V) 1312(a) (Attorney General); 20 U.S.C. (Supp. V) 1234(a) (Commissioner of Education); 29 U.S.C. (Supp. V) 816(b) (Secretary of Labor); 30 U.S.C. 185(r)(5) (Secretary of the Interior); 33 U.S.C. 1908(e), 46 U.S.C. 86h(a) (Secretary of the department in which the Coast Guard is operating); 38 U.S.C. (Supp. V) 1673(d) (Administrator of Veterans' Affairs); 42 U.S.C. 3142(b)(1) (Secretary of Commerce); 42 U.S.C. (& Supp. IV) 2000a-5, 3613, 3766(c)(3), 3789d(c)(3) (Attorney General); 49 U.S.C. (Supp. V) 10934(c)(1) (Interstate Commerce Commission); 7 U.S.C. 2305(b) (Secretary of Agriculture); 29 U.S.C. 160(1) (National Labor Relations Board); 46 U.S.C. 88f (collector of customs or Coast Guard District Commander). Cf. 2 U.S.C. (Supp. V) 501(e) (House Committee on Congressional Mailing Standards) ("substantial reason to believe"); 2 U.S.C. 502(b) (Senate Select Committee on Standards and Conduct of the Senate) (same); 8 U.S.C. 1182(a)(27) (consular officer or Attorney General) ("knows or has reason to believe"); 15 U.S.C. (& Supp. V) 77 (President) ("reasonable ground to believe"); 15 U.S.C. 77t(b), 78u(d) (Securities and Exchange Commission) ("appears to the Commission"). See generally 12 U.S.C. (Supp. V) 1464(d)(2)(A) (Federal Home Loan Bank Board) ("reasonable cause to believe" future violation is about to take place); 12 U.S.C. (Supp. V) 1730(e)(1) (Federal Savings and Loan Insurance Corporation) (same); 12 U.S.C. (Supp. V) 1786(e)(1) (National Credit Union Administration Board) (same); 12 U.S.C. (Supp. V) 1818(b)(1) (Federal Deposit Insurance Corporation) (same); 46 U.S.C. 834 (Secretary of the Treasury) ("satisfactory reason to believe"); 49 U.S.C. 41(3) (Attorney General) ("reasonable grounds to believe").

[35] See, *e.g.*, Fed. R. Civ. P. 11 (signing of pleading by attorney certifying that there is "good ground to support it").

nal [36] proceedings would be delayed while the courts went behind facially valid complaints to determine whether the charging authority actually possessed a sufficient factual basis to initiate a proceeding. Such review could soon bring the regulatory and judicial functions of the government to a complete standstill.[37]

The intensely practical considerations justifying the conclusion of the Court in *Socal* are amply illustrated by the course of events in this case, and mandate reversal of the court of appeals. By relying on its own "bottom line statistics" (J.A. 93) and claiming that the "statistical data now in the Commission's possession [do not] provide a basis for finding reasonable cause" (*id.* at 157), respondent has nullified for more than three years the Commission's investigation into the merits of Commissioner Norton's charge. Based on its assertion that the Commission has not yet established the necessary facts to bring a civil enforcement action, respondent has prevented the Commission from determining whether there are indeed reasonable grounds for considering such a course of action. These arguments go far beyond Section 706(b)'s requirement that the Commission provide respondents with notice of pending administrative charges; these arguments unavoidably trench on substantive concerns. A subpoena

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[36] See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (same).

[37] The Ninth Circuit refused to impose a factual pleading requirement on the Commission precisely because of the litigation such a rule would stimulate. The court noted that requiring the Commission to supply the basis for a charge "would inevitably encourage employers to challenge subpoenas on the ground that the EEOC could have supplied more information than was actually contained in the charge" (*EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1339).

enforcement proceeding, however, should not become a full fledged trial on the merits of an administrative charge.[38]

The decision below would supply every respondent to a commissioner's charge with immediate access to judicial review on the ground that the Commission has not provided a sufficient "factual basis" for the charge. Should the Commission be required to defend such actions in federal court as a matter of course, as well as submit to the depositions, interrogatories and other discovery sought by respondent (Resp. Br. In Opp. 5, 9, 19), the "integrated, multistep enforcement procedure" (*Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 359) designed by Congress in Title VII would simply break down.[39] The decision below erroneously and all too readily "enable[s] those subject to administrative authority unduly to delay investigations into their affairs." B. Schwartz, *Administrative Law* § 45, at 115 (1976).

Title VII of the Civil Rights Act of 1964 does not impose strict, technical pleading requirements upon complainants, whether they be private parties or the commis-

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[38] The record in this case demonstrates the fragile nature of the "notice" veil with which respondent has attempted to cloak its arguments. Although respondent argues that concepts of "fair notice" (Resp. Br. In Opp. 15) require the Commission to disclose the factual basis for a Section 706(b) charge, the record in this case discloses that, from the outset of this litigation, respondent has been repeatedly informed that Commissioner Norton's charge was formulated in accordance with "the published standards for the selection of systemic respondents" (J.A. 94). These standards provide that a systemic charge is based on "an analysis of EEO reporting data" (Pet. App. 41a-42a), and respondent has acknowledged that "much" of the statistical data upon which the present charge is based was "provided by the respondent" (J.A. 157; see also *id.* at 92). Therefore, respondent's assertion that it lacks "notice" of the factual basis for the present charge, while artful, is hardly persuasive.

[39] *Cf. EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1067 (judicially ordered discovery into the factual basis of a Section 706(b) charge is "inconsistent with the enforcement scheme of Title VII").

sioners of the EEOC. A charge under Section 706(b) "is merely the first step in the administrative process, and it would defeat the Congressional scheme to impose detailed fact pleading burdens on the EEOC before it has had an opportunity to investigate the basis for the charge." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission satisfies the "oath" and "notice" requirements regarding the "date" and "circumstances" elements of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of either a good faith estimate of the probable time periods of the alleged violations or any specific factual averments.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT SHELL OIL COMPANY

STATEMENT OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chair of the Equal Employment Opportunity Commission ("EEOC" or "the Commission"), issued a Commissioner's charge alleging discrimination by Shell Oil Company ("Shell")[1] at Shell's Wood River, Illinois refinery. The charge set forth neither the relevant dates of the

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[1] The parent companies and current affiliates of Shell are set forth in Appendix A, *infra*.

alleged violations nor any specific factual basis for the charge.[2]

Shell was served with a notice of and a copy of the charge on October 26, 1979. (J.A. 62).[3] Like the charge itself, the notice contained neither the relevant dates of the alleged violations nor the factual basis for the charge. Accompanying the notice and the charge was a letter from the District Director of EEOC and a "First Request For Information." (J.A. 64-82). In the request for information, the Commission sought extensive data on virtually every aspect of employment at the Wood River facility. Following discussions with the Commission regarding the request for information, Shell advised the Commission by letter dated March 7, 1980, that there had been no race or sex discrimination charges filed against the Wood River facility in the previous six years and that the only two charges filed in the previous decade had been dismissed. In addition, Shell expressed concern over the lack of specificity in the charge and requested additional information from the Commission regarding the basis for the charge. (J.A. 89-93). On May 15, 1980, EEOC issued an administrative subpoena seeking the previously requested information. (J.A. 112-127).

In its petition to revoke or modify the subpoena, Shell argued, among other grounds, that the charge was invalid because of its failure to adhere to the requirements of Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), as amended. (J.A. 140-145).[4] Following the Commis-

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[2] The charge is set forth in Appendix B, *infra*.

[3] "J.A." refers to the Joint Appendix prepared and filed herein pursuant to Supreme Court Rule 30.

[4] Section 706(b) reads in pertinent part as follows:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (*in-*

sion's final denial of Shell's petition to revoke or modify the subpoena (J.A. 164-168), Shell filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. (J.A. 169-182). In its complaint, Shell sought, among other things, a declaration that the Commissioner's charge was invalid because of the Commission's failure to adhere to the statutory requirements of Section 706(b) of Title VII. *Id.* On January 16, 1981, Commissioner Norton amended the charge "to state that I have reason to believe that the named employer had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present."[5] Subsequently, the Commission filed an action in the United States District Court for the Southern District of Illinois to enforce its administrative subpoena (J.A. 57), which action was ordered transferred to the Eastern District of Missouri and ultimately consolidated with Shell's suit. (J.A. 4-5). The District Court (Cahill, J.), in an opinion reported at 523 F. Supp. 79, ordered that the Commission's subpoena should be enforced. (Pet. App. 15a-31a).[6] Shell appealed.

The Eighth Circuit, in an opinion reported at 676 F.2d 322, held that the Commissioner's charge failed to satisfy the requirements of Section 706(b) due to its failure to advise Shell adequately of the "date" and "circumstances" of the alleged violations. (Pet. App. 1a-14a). The panel's original opinion reflected an apparent as-

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cluding the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . within ten days and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation* and shall contain such information and be in such form as the Commission requires. (Emphasis added).

[5] The amended charge is set forth in Appendix C, *infra*.

[6] "Pet. App." refers to the Appendix to the Commission's petition for a writ of certiorari.

sumption by the court that the Commissioner's charge was based on an individual charge of discrimination.[7]

In its Petition for Rehearing, the Commission for the first time informed the court that the Commissioner's charge was not based on an individual complaint, but rather was based on statistical data filed with it or with other federal agencies. 676 F.2d at 325 n.5. Apparently based on the Commission's revelation, but on its own motion, the panel modified its original opinion. (Pet. App. 10a-14a). In its modified opinion, the panel stated that the notice required by Section 706(b) "should at least inform the employer of the approximate dates of the unlawful practices and include enough other information to more fully identify the information that has been used as the basis for the subpoena." 676 F.2d at 325. The panel stated that:

> We do not read 42 U.S.C. § 2000e-5 as prohibiting the filing of a Commissioner's charge which is based on statistical data obtained by the Commissioner from annual reports. We do hold, however, that the basic information that the charge is based on statistical data and the general nature of that data, including dates, should be disclosed in the charge. *Id.* at 325 n.5.

With regard to the "date" element of Section 706(b), the court stated that the use of July 2, 1965 (the effective date of Title VII) was not sufficient, since such a "date" did not give adequate notice to the employer of the parameters of the investigation. *Id.* at 325. The court read Section 706(b) as requiring a "basis in fact" for the date alleged in the charge, and found no factual basis in the allegation of July 2, 1965, as the beginning date of the alleged violations. *Id.*

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[7] For example, the original opinion stated that the charge should include "the date on which a charge was filed with the Commission by an *aggrieved individual*" as well as the position of the aggrieved individual. (Pet. App. 8a) (emphasis added).

Similarly, the court held that the statement of "circumstances" must be supported by "some factual or statistical basis." *Id.* at 326. The panel stated that notice of the factual basis for the charge "enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations." *Id.* Finally, the court summarized the information that should be included in a sufficient Commissioner's charge as follows:

> [T]he type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (e.g., failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (e.g., applicant, employee, former employee). *Id.*

At the same time that the panel issued its modified opinion, the Eighth Circuit denied the Commission's petition for rehearing en banc, with Chief Judge Lay dissenting. (Pet. App. 34a-39a). The Commission's petition for a writ of certiorari was filed on November 16, 1982, and was granted on February 22, 1983. (J.A. 183).

SUMMARY OF ARGUMENT

As originally enacted in 1964, Title VII required that a Commissioner's charge be based on "reasonable cause" to believe a violation of the Act had occurred. Congress intended this requirement to serve as a meaningful constraint on the Commission's authority to initiate investigations. In addition, Congress intended the Commission to have authority to act only on a "specific charge" of discrimination.

Section 706(b), as amended in 1972, requires that a Commissioner's charge be under "oath or affirmation" and that the employer receive notice of the "date, place and circumstances" of the alleged violations. Both the

"oath or affirmation" and "date, place and circumstances" requirements placed an obligation on the Commission to provide greater detail in its charges than had been required under the 1964 Act.

In order for the "oath or affirmation" requirement of Section 706(b) to have legal consequence, a Commissioner's charge must contain statements of fact, not merely statements of belief or conclusory allegations. Since it is virtually impossible to prove or disprove a Commissioner's *belief* that an employer has engaged in discriminatory practices, a factual basis for that belief must be revealed in the charge. Thus, there is a vital link between the oath or affirmation requirement and the notice requirement of date, place and circumstances. A court must be informed of the factual basis for a charge if there is to be any meaningful statutory safeguard against a Commissioner's filing of an unfounded charge.

The clear language of Section 706(b) of Title VII mandates that an employer who is charged with violating Title VII must be given notice of the "date, place and circumstances" of the alleged violations. In addition to this statutory requirement, the Commission's own regulations require "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12 (a)(3). Any discretion which Section 706(b) may give to the Commission to determine the form and content of charges does *not* authorize the Commission to issue a regulation which ignores the statutorily required notice of date and circumstances.

The Eighth Circuit in this case correctly held that the mere reference to the effective date of Title VII, without more, does not satisfy the "date" requirement of Section 706(b). The inclusion of the effective date of Title VII by itself is not a sufficient statement of the "date," since it does not provide any basis for a court to determine why the Commission considers such to be a "good faith

estimate" of the probable time periods of the alleged violations. Indeed, the effective date of Title VII provides no more notice than the Act itself and, thus, does not provide a basis for determining whether the information requested in a subpoena is material and relevant to the charge.

The Eighth Circuit also correctly held in this case that a mere recitation of general allegations of discrimination without any illuminating facts is not sufficient to meet the "circumstances" requirement of Section 706(b). The requirement that the Commission set forth some basis in fact for the alleged violations is consistent with a plain reading of Section 706(b) and the Commission's own regulations. This requirement will provide reasonable notice to the charged employer without unnecessarily interfering with the functioning of the Commission. In the absence of a reasonably specific notice of the "circumstances" of the alleged violations, neither the charged employer nor a court which is asked to enforce a subpoena can determine whether the Commission has acted within its lawful authority.

Affirmance of the Eighth Circuit's decision will not impose "technical pleading requirements" on the Commission or otherwise unduly burden or impede it in its work. It merely will require the Commission to adhere to the oath requirement and the plain meaning of the "date, place and circumstances" language of Section 706(b).

The limited, charge-based investigatory authority of the Commission is in contrast to the self-initiating authority of many other federal agencies which Congress expressly refused to grant the Commission. Since the Commission is without authority to commence an investigation in the absence of a valid charge of discrimination, a court which is asked to enforce a Commission subpoena *must* determine the validity of the charge. Thus, a valid Commissioner's charge is not a discretionary "threshold

determination" as in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"), but rather is a *condition precedent* to any EEOC investigatory authority. Accordingly, the concerns which this Court expressed in *Socal* regarding the interruption of *discretionary* agency functions in their early stages are not applicable in the instant case.

In addition to affirmance of the decision below, guidance by this Court is essential to avoid needless confusion and litigation over the amount of detail necessary in statistically-based Commissioner's charges alleging pattern or practice violations. Disclosure of the statistical bases of such charges will not interfere with the functions of the Commission under Title VII but instead will further the investigatory and conciliatory processes of the Commission.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE COMMISSIONER'S CHARGE HEREIN WAS INVALID BECAUSE IT CONTAINED NEITHER A GOOD FAITH ESTIMATE OF THE PROBABLE DATE NOR SUFFICIENT INFORMATION TO MEET THE OATH AND NOTICE REQUIREMENTS OF TITLE VII.

It is important to emphasize at the outset what this case does *not* involve.

First, it does not involve a challenge to the Commission's investigatory authority *after* a valid charge of discrimination has been filed. Once a valid charge has been filed, the Commission may seek information which is relevant and material to the charge.

Second, the decision of the Eighth Circuit in this case did not impose a requirement that the Commission must demonstrate "reasonable cause" or "probable cause" before a subpoena may be enforced. Nor did the decision below impose strict technical pleading or evidentiary requirements on the Commission (as argued by the Solicitor). What the court below did require is that a valid

Commissioner's charge of discrimination must meet the explicit "oath" and "notice" requirements of Section 706 (b) by properly setting forth the "date, place and circumstances" of the alleged violations.

Third, this case does not call into question other statutes under which agencies may commence investigations based on "reasonable cause" or "reason to believe" a violation exists. Since Section 706(b) does not contain a "reasonable cause" or "reason to believe" standard, a decision in this case should not affect agencies which have a reasonable cause standard.

Since a valid charge is a condition precedent to the investigatory authority of the Commission,[8] a court which is called upon to enforce a Commission subpoena *must* determine that the charge meets all the requirements of Section 706(b)—including a proper specification of the "date, place and circumstances" of the alleged violations. Therefore, what this case *does* involve is a relatively straight-forward interpretation of the meaning of the oath and notice (of the "date" and "circumstances") requirements of Section 706(b) of Title VII.[9]

Although the statutory requirements are clear from the plain language of Section 706(b), it is helpful to observe that Congress intended to restrict the investigative powers of the Commission and to prevent the unbridled use of Commissioner's charges. This intent is reflected in the legislative history of both the 1964 Act and the 1972 Amendments to the 1964 Act.

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[8] The Commission has conceded that a valid charge of discrimination is a "condition precedent" or "prerequisite" to a Commission investigation. (Pet. Br. 30, 33). ("Pet. Br." refers to the Solicitor's brief on the merits in this matter). In addition, *see* pp. 10-12, 14 and 33-38, *infra*.

[9] The Commissioner's charge at issue herein stated that the "place" of the alleged violations was Shell's Wood River Refinery. Compliance with the "place" requirement of Section 706(b) thus is not contested in this case. *See* 676 F.2d at 325 n.4.

A. Congress Intended The Requirements For The Issuance Of a Commissioner's Charge To Serve As A Meaningful Constraint Upon The Commission's Authority to Initiate Investigations.

1. *Congressional Intent Under The 1964 Civil Rights Act*

Under Title VII, as originally enacted in the 1964 Civil Rights Act, the authority of the Commission was limited to the investigation of charges of employment discrimination and informal methods of conciliation and persuasion.[10] If it were unable to effect conciliation of a charge, the Commission had no authority to commence an enforcement action. Enforcement was limited to "pattern or practice" actions by the Department of Justice and private actions by a charging party after unsuccessful efforts by the Commission to conciliate. *See General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 325-26. (1980); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358-59 (1977).

The Commission's investigative authority itself was limited. The intent of Congress to circumscribe this authority was clearly expressed in the Interpretative Memorandum of Senators Clark and Case: [11]

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge had been filed in writing. In this respect *the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission*, 15 U.S.C. 43, 46, *or of the Wage*

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[10] Section 706(a), 42 U.S.C. § 2000e-5(a) (1970), (Pub. L. No. 88-352, 78 Stat. 259).

[11] Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. The Clark-Case Interpretative Memorandum has been relied upon by this Court on numerous occasions, *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 350-51 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 and n.11 (1971), and is an authoritative indicator of the meaning of the provisions of Title VII.

> *and Hour Administrator*, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpenas, whether or not there had been any complaint of wrongdoing. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Hunt Foods and Industries, Inc. v. Federal Trade Commission*, 286 F.2d 803, 806-807 (C.A. 9, 1961), *cert. denied*, 356 [sic] U.S. 877 (1961). Interpretative Memorandum on Title VII of Senators Clark and Case, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W. S. Hein & Co.), at 3045. (Emphasis added).[12]

The Congressional intent to make a valid charge a condition precedent to the Commission's investigative authority has been recognized uniformly by the courts. In *EEOC v. Union Bank*, 408 F.2d 867, 870 (9th Cir. 1968), the Ninth Circuit held that where a valid complaint had not

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[12] In light of this legislative history, the Solicitor's reliance on FTC cases is incorrect. In particular, his reliance on *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), for the apparent proposition that EEOC may "exercise powers of original inquiry" (Pet. Br. 40), is misplaced because EEOC clearly possesses no such "powers of original inquiry" as those contained in 15 U.S.C. §§ 43 and 46. As set forth above, the legislative history specifically cited the FTC case of *Hunt Foods and Industries, Inc. v. FTC*, 286 F.2d 803, 806-07 (9th Cir.), *cert. denied*, 365 U.S. 877 (1961), as an example of the kind of authority which EEOC would *not* possess. The distinction between the authority of the FTC and that of EEOC is discussed further in part II, *infra*.

Section 11(a) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 211(a), provides that the Administrator of the Wage and Hour Division may conduct such investigations "as he may deem necessary or appropriate to determine whether any person has violated any provision" of the Act. The reliance by the Solicitor on *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (Pet. Br. 43), is therefore similarly misplaced. That case involved the broader authority of the Wage and Hour Administrator under the FLSA. Moreover, as set out above, *Oklahoma Press* was cited specifically in the legislative history as another example of the authority which Congress specifically withheld from the EEOC.

been filed with the agency, "the Commission was without jurisdiction to issue the demand for production." Likewise, in *Graniteville Co. v. EEOC*, 438 F.2d 32, 35 (4th Cir. 1971), the Fourth Circuit stated that "the EEOC is without jurisdiction to proceed in the absence of a valid charge."[13] *See also New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 712 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975); *EEOC v. Container Corp. of America*, 352 F. Supp. 262, 265 (M.D. Fla. 1972) ("The Court views each one of the deliberate steps in this statutory scheme—charge, notice, investigation, reasonable cause, conciliation—as intended by Congress to be a condition precedent to the next succeeding step and ultimately legal action.").

While the 1964 Act authorized Commissioners to issue charges, it is clear from the legislative history that the sole reason for this authority was to protect individuals who were fearful of reprisal if they themselves filed a charge:

> We must have the ability to get the Commission into action, for the purpose of eliminating discrimination, without requiring complaint by an aggrieved party in every case, because intimidation of individuals in areas where this is most necessary, whether it be economic, social, or any other kind of intimidation,

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[13] The Fourth Circuit also stated in *Graniteville*, 438 F.2d at 41 that:

> Congress sought to control mere "fishing expeditions" by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner with sufficient prior information to have reasonable cause to believe that a statutory violation had occurred. The amendment makes clear not that the EEOC may not subpoena all evidence that "relates to any matter under investigation or in question," but that *properly filed charges are the only "matters" which can be "under investigation or in question."* (Emphasis added).

> may, in many cases, prevent the filing of complaints by aggrieved persons. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3305 (remarks of Senator Case).[14]

This limited authority to issue Commissioner's charges was restricted further by Section 706(a) of Title VII, which provided that a Commissioner's charge could be filed where the Commissioner had "reasonable cause" to believe a violation of the Act had occurred and where the charge set forth the "facts" on which it was based.[15] Congress intended these requirements of Section 706(a) to operate as a check on unbridled Commission discretion to issue and investigate charges of discrimination:

> Mr. Chairman, I think the chairman will agree with me that *this is a section to protect us from errant and arrogant bureaucracy—from any administrator running wild without any reasonable cause.* • • • We very carefully provided that there had to be reasonable cause to believe that there had been a violation before any administrator moved into a situation. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3313

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[14] The courts in cases involving a Commissioner's charge, until this one, apparently had assumed that the Commissioner's charge at issue was based on an underlying individual charge of discrimination filed by a person who wished to remain anonymous. It was not until its petition for rehearing in the Eighth Circuit in this case that the Commission indicated to the court that there was *no* underlying individual charge involved and that the charge herein was the product of the agency's Office of Systemic Programs. 676 F.2d at 325 n.5.

[15] Section 706(a) read in pertinent part as follows:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has *reasonable cause* to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer . . . has engaged in an unlawful employment practice, the Commission shall furnish such employer . . . with a copy of such charge. . . . (Emphasis added).

remarks of Congressman Goodell). (Emphasis added).[16]

Thus, it is clear that in 1964 Congress intended to define and circumscribe carefully the authority of the Commission under Title VII—and, in particular, the Commission's use of Commissioner's charges. Although the 1972 Amendments expanded the authority of the Commission to enable it to obtain enforcement and to bring pattern or practice cases, it is clear that the Amendments did not reduce the requirements for a Commissioner's charge, but instead, made them more stringent.

2. *The Congressional Intent In the 1972 Act*

The 1972 Amendments to Title VII[17] are significant not only for what they did, but also for what they did *not* do. First, the Amendments did not grant the Commission cease and desist enforcement authority as originally proposed. Instead, the Amendments empowered the Commission to institute suit to effect enforcement of the Act where conciliation attempts had failed. Second, the Amendments did not transfer the audit authority of the Office of Federal Contract Compliance (now the Office of Federal Contract Compliance Programs—the "OFCCP") to the Commission as originally proposed. Instead, the investigative authority of the Commission remains subject to the filing of a valid charge of discrimination.[18] Third,

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[16] Congressman Celler also acknowledged the intended limits on the Commission's authority when he stated:

> In other words, we want to be sure that before the member of the Commission acts he has reasonable cause to believe a violation of the act occurred. We want unequivocally to nail down that condition precedent [to a Commissioner's charge] and, therefore, we provide for this additional language. *Id.*

[17] Pub. L. 92-261, March 24, 1972.

[18] *See, e.g., EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982); *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978). While it is true that Title VII establishes "an

although the pattern or practice functions of the Attorney General in the private sector were transferred to the Commission, such functions were made subject to the requirements of Section 706 of the Act—the functions did not remain subject to the "reasonable cause to believe" standard upon which the Attorney General's authority was based. Overall, the basic purpose of the Amendments, "to secure more effective enforcement of Title VII," was effected "by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII." *General Tel. Co. of the Northwest v. EEOC*, *supra*, 446 U.S. at 325. Congress was not seeking to eliminate or reduce the requirements for a Commissioner's charge or expand the Commission's investigative authority.

The 1972 Amendments made two major changes in the requirements for a Commissioner's charge under Title VII. First, rather than requiring that a Commissioner's charge be based on "reasonable cause," a Commissioner now is required to issue the charge under "oath or affirmation." Second, instead of stating in the charge the "facts" on which the charge was based, Section 706(b) now requires that the Commission "shall serve a notice of the charge (including the date, place and circumstances)" of the alleged violations.[19] Although there is little in the legislative history of the 1972 Amendments to explain why these changes were made, the legislative history suggests that they were the result of a compromise in Conference Committee. The nature of the compromise suggests an intent to make the requirements for a Commissioner's charge more stringent than the previous "reason to believe" standard.

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integrated multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court" (Pet. Br. 14), a valid charge under Section 706(b) is a condition precedent to the remaining steps of the process.

[19] The relevant portions of Section 706(b) are set forth at n.4, *supra*.

As passed by the House, H.R. 1746 retained the "reasonable cause to believe" standard for a Commissioner's charge and the requirement that a charge set forth the facts on which it is based, but provided that a copy of the charge should be furnished to the respondent within five days of its filing. Legislative History of the Equal Employment Opportunity Act of 1972 at 327-28 (1972). S. 2515, the bill passed by the Senate, provided that all charges should be under "oath or affirmation," that the Commission could file a charge "*upon the request of any person claiming to be aggrieved*," and that "the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" upon the employer within 10 days. *Id.* at 1780. (Emphasis added).[20] The Conference Committee reported that the conflicting bills were compromised in the following manner:

> The Senate receded with an amendment providing that charges be filed by or on behalf of the person claiming to be aggrieved or by a member of the Commission, alleging that an unlawful employment practice occurred. Charges are to be in writing under oath or affirmation and in such form as the Commission requires. A notice of a charge including the date, place and circumstances of the alleged unlawful employment practice is to be served on the respondent within 10 days. *Id.* at 1814, 1836.

Although the Senate "receded" from its position that a charge could be issued by a Commissioner only upon the request of an aggrieved individual, the language agreed

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[20] The Senate requirement to provide notice (in contrast to the House proposal to provide a copy of the charge) obviously was intended to meet the dual purposes of (1) insuring due process by providing a respondent with prompt notice, and (2) protecting an individual grievant from potential retaliation. It would be anomolous if, in seeking to protect the grievant's identity by a "notice" of the charge, the Senate intended the notice to be prompt, but not necessarily meaningful.

to by the Conference Committee did not use either the House-proposed "reasonable cause to believe" standard or the House proposal for providing a copy of the charge to the respondent within five days. These exceptions are significant. Because there would be no point for the Senate to "recede" from its original position to a position less stringent than that originally proposed by the House, the compromise strongly suggests that the oath requirement was intended to be more (not less) stringent than the "reasonable cause to believe" standard. The fact that the compromise utilized the Senate's notice requirement also suggests an intent by Congress to require greater specificity than the previous requirement that a charge disclose the "facts" upon which it is based.

Several courts which have considered the issue have concluded that the oath requirement is more stringent than the "reasonable cause to believe" standard. In *EEOC v. Appalachian Power Co.*, the court reasoned that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission. . . . [T]hat is the clear import of the language Congress placed in the Act in 1972. 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd for reasons set forth by the District Court*, 568 F.2d 354 (4th Cir. 1978).

In *Stewart v. Core Laboratories, Inc.*, the court concluded:

> [T]he 1972 Amendment requires the Commission to file charges "upon an oath or affirmation," rather than upon the less onerous requirement of "reasonable cause." 460 F.Supp. 931, 933 (N.D. Tex. 1978).

Similarly, in *New Orleans Public Service, Inc. v. Brown*, *supra*, 369 F. Supp. at 708, the court stated that "[w]ithout doubt, this modification on the requisites, a charge under oath replacing a charge based on reasoned belief,

for issuance of a Commissioner's charge created a stricter burden." [21]

Not only is there legislative history indicative of a Congressional intent to retain and make more stringent the requirements for a Commissioner's charge, there is nothing in the legislative history to suggest that Congress intended anything other than the plain meaning of the language enacted in Section 706(b). As this Court noted in *Mohasco Corp. v. Silver*, 447 U.S. 807, 819 (1980), it is the court's "task to give effect to the statute *as enacted*." (Emphasis added). "Only if the legislative history of [the section] cannot mean what it so clearly seems to say would there be any justification for construing it in any other way." *Occidental Life Ins. Co. of Cal v. EEOC*, *supra*, 432 U.S. at 361. There is *no* legislative history which would suggest a Congressional intent other than the plain language of Section 706(b) that a charge be under oath or affirmation and that employers be furnished with reasonably specific notice of the "date, place and circumstances" of alleged violations.[22]

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[21] The court also noted that "[b]olstering this stricter burden produced by the charge under oath requirement of the amended Civil Rights Act is the concomitant requirement that the charge set forth the date, place, and circumstances of the alleged unlawful employment practices." *Id.* at 708 n.3. Although not all courts have concluded that the "oath" requirement in the 1972 Amendments imposes a heavier burden on Commissioner's charges than had been imposed under former section 706(a), no court has held that by the 1972 Amendments Congress intended to require less for a proper Commissioner's charge.

[22] The Solicitor contends that by the 1972 Amendments "Congress eliminated any factual pleading requirement entirely, substituting instead the notice provisions of Section 706(b)." (Pet. Br. 21). This comment misses the point. First, the comment overlooks the oath requirement. See section I. B, *infra*. Second, while the oath and notice requirements imposed by the 1972 Amendments do not constitute "factual pleading requirements," they were nonetheless intended to serve a purpose. Third, there is *nothing* in the 1972 legislative history to indicate that Congress had any lessened concern about an "errant and arrogant bureaucracy" (*see* page 13, *supra*),

3. *An Agency Regulation Cannot Override A Statutory Requirement*

Citing the language of Section 706(b) that provides that charges "shall contain such information and be in such form as the Commission requires," the Solicitor maintains that "Congress . . . expressly left the form and content of Section 706(b) charges to Commission discretion." (Pet. Br. 21). The Solicitor further asserts that the Commission has exercised this discretion by providing in 29 C.F.R. § 1601.12(b), that "a charge is sufficient when the Commission receives from the person making the charges a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." (Pet. Br. 15). On the basis of these two sources, the Solicitor argues not only that the instant charge was sufficient because it complied with the Commission's regulations (Pet. Br. 15) but also that courts err if they "[substitute their] own sufficiency requirements for those adopted by the Commission." (Pet. Br. 16). These assertions err on two grounds.

First, the Solicitor's assertions ignore the Commission's own regulations contained in 29 C.F.R. § 1601.12(a)(3) and 29 C.F.R. § 1601.14(a). The former provides that each charge should contain:

> [a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices.

The latter regulation provides:

> the respondent will be served with a notice of the charge within ten days after the filing of the charge (including the date, place, circumstances and identity of the person filing the charge . . .).

These regulations merely carry out the express statutory language of Section 706(b). The obvious purpose of Sec-

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than it had in 1964. Thus, it can only be concluded that Congress meant those requirements to continue to act as a rein on the Commission.

tion 1601.12(b), however, is to provide latitude for unsophisticated individuals, not to shield Commissioner's charges from the statutory requirements.[23]

Second, and more importantly, the general statutory provision that the Commission may determine the form and content of a charge cannot override the specific statutory requirements that a charge be under "oath or affirmation" and that the respondent be provided with notice of the "date, place and circumstances" of the alleged violations. The only reasonable reading of Section 706(b) is that the Commission has discretion to determine the form and content of a charge within the bounds of the statutory requirements. This Court noted in *Mohasco Corp v. Silver, supra*, 447 U.S. at 825:

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretation" of the statute cannot supersede the language chosen by Congress.

See also General Electric Co. v. Gilbert, 429 U.S. 125, 140-42 (1976).

Without referring to any source, the Solicitor also asserts that the Commissioner's "decision to initiate the administrative process in this case was well within her lawful discretion." (Pet. Br. 43). Such an assertion ig-

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[23] Some courts have held that charges filed by a layman may be construed liberally since the persons filing the charges may not be sophisticated in the law. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970); *White v. North La. Legal Assistance Corp.*, 468 F. Supp. 1347, 1351-52 (W.D. La. 1979). The Solicitor maintains, however, that the instant charge was a product of the Commission's "systemic" program, and, as such, it should have been reviewed at successive stages of the process, by professionals in the agency, including a number of attorneys. *See* EEOC Compliance Manual (BNA) § 16.3. Thus, there is no reason with systemic Commissioner's charges to apply the same "liberal reading" as some courts have to charges filed by unsophisticated laymen.

nores the statutory requirements of Section 706(b). As noted at pp. 10-12, *supra*, Congress expressly declined to give the Commission discretionary authority to initiate investigations. *See also* discussion in Section II, *infra*.

B. To Be Meaningful, The Oath Requirement Necessitates A Statement Of Fact Or The Basis For An Asserted Belief.

As discussed above, a valid charge is a condition precedent to the investigative authority of the Commission and, for a charge to be valid, it must meet the oath and notice requirements of Section 706(b).

In order for the "oath or affirmation" requirement to have meaning and to serve its intended purpose, the requirement necessitates something more than a mere declaration of belief and generalized conclusions. A document, such as the instant charge, which is required by federal statute to be issued under oath or affirmation must meet the requirements for an affidavit if the oath is to be an enforceable safeguard. *See Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 354 (D.C. Cir. 1949). The requirements for an affidavit are set forth in 3 Am. Jur.2d *Affidavits* § 20 (2d ed. 1962) as follows:

> If possible, an affidavit should be made by one having actual knowledge of the facts, and its allegation should be of the pertinent facts and circumstances, rather than conclusions, and should be full, certain, and exact. . . . The affidavit may be in the form of a verification, that is, a sworn statement of the truth of the facts stated in the instrument verified.

See United States v. Johns-Manville Corp., 245 F. Supp. 74, 83-85 (E.D. Pa. 1965); *Sears, Roebuck & Co. v. American Plumbing & Supply Co.*, 19 F.R.D. 334, 339 (E.D. Wis. 1956).

Where a sworn statement is based on information and belief, it nevertheless should contain the source of the affiant's information and the grounds for the belief so that a court can determine if the belief is well-founded. 3 Am. Jur.2d *Affidavits* § 22 (2d ed. 1962); *see also Johnston Broadcasting Co. v. FCC*, *supra*, 175 F.2d at 354-56; *United States v. Zagari*, 419 F. Supp. 494, 504 (N.D. Cal. 1976).

The instant charge did not meet any of these standards: it contained no specific information, no factual basis for the charge, and no grounds for the belief expressed therein. Therefore, the "oath or affirmation" requirement was rendered unenforceable and meaningless. It is utterly impossible for a court which is asked to enforce the subpoena issued pursuant to this charge to determine whether the oath was taken in good faith or whether it was violated.

The Solicitor argues that the good faith of federal officials can be presumed and that it provides a sufficient check on possible agency abuses without requiring the need "for the federal courts to erect additional barricades." (Pet. Br. 38). It is not the federal courts that have erected these requirements but, rather, Congress itself by the plain language of Section 706(b). In any event, unfortunately, the "good faith of high level government officials" (Pet. Br. 39), has not prevented the Commission from filing and pursuing irresponsible charges. In *EEOC v. Union Camp Corp.*, 536 F. Supp. 64, 66 (W.D. Mich. 1982), the court stated:

> This matter is a prime example of an attitude on the part of government agencies, the EEOC in particular, which this Court has viewed with alarm from time to time. Here the charging party cries discrimination and the EEOC, *despite an utter lack of evidence*, sympathetically files suit, hoping that defendant will surrender rather than go to trial. When, as here, defendant refuses to knuckle under, EEOC goes to a lengthy trial, tries the case poorly,

> loses and hopes a lesson has been taught. (Emphasis added).

See also EEOC v. Ipco Hospital Supply Co., 32 FEP Cases 130, 132 (S.D. N.Y. 1983) ("Moreover, any doubt as to the EEOC's lack of good faith would be dispelled by the circumstance that in the course of trial its counsel deliberately attempted to deceive the Court as to a material fact"); *EEOC v. Datapoint Corp.*, 457 F. Supp. 62, 65 n.10 (W.D. Tex. 1978); *EEOC v. Anchor Continental*, 74 F.R.D. 523 (D. S.C. 1977).[24]

The court in *EEOC v. Western Electric Co.*, 382 F. Supp. 787, 801 (D. Md. 1974), clearly recognized that the Commission's good intentions do not necessarily ensure its compliance with statutory requirements:

> As a final comment, the Court is disturbed by the Commission's attitude that most of the issues raised herein are purely technical objections. It holds that its well-meaning goal of eliminating employment discrimination justifies the breach of any procedural rules or regulations. This Court cannot agree. The elimination of crime is also a desirable goal consid-

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[24] Similar Commission arguments for virtually unreviewable Title VII authority recently have been found to be unacceptable by the courts. In *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981), the court rejected Commission arguments that injunctive relief should issue as a matter of course whenever the Commission concludes that "prompt judicial action is necessary to carry out the purposes of this Act." *Id.* at 1040. Rather than defer to the Commission, the court required the Commission to meet the traditional injunctive standard of demonstrating that "irreparable harm" would result if the injunction did not issue. The court's disposition of the Commission's argument in *Anchor Hocking* also is apt here: "If Congress had intended such a result, it could have either given the EEOC independent enforcement powers or limited the court's discretion by express langua[illegible]." *Id.* at 1043. That Congress did not do so strongly suggests that the mere fact that the charge herein has been made under oath or affirmation does not absolve the charge of the need for judicial scrutiny to insure that the prerequisites of Section 706(b) have been complied with.

> ering the human waste it visits. Yet, a court could not dismiss the failure to advise an accused of his constitutional rights as a mere technicality. So, too, in this case where serious charges of discrimination have been made, the defendant cannot be stripped of all rights.
>
> The events of the past year, indeed the past month [a reference to Watergate], have taught us the meaning of that phrase "ours is a government of laws not of men." The Government expects its citizens to obey the law, and when they do not, it asks for an accounting. How strange it is that when a government official or agency breaches a statute or regulation, it is casually dismissed as a mere technicality. A government which does not respect the law certainly cannot expect its citizens to do so. *No one is above the law including the EEOC.* (Emphasis added).

Thus, the Solicitor's assurances of the Commissioners' good faith are not enough. Congress made the oath and notice requirements of Section 706(b) applicable to Commissioner's charges in order to serve as an effective rein on the Commission's authority. This Court should not interpret those requirements in a way that negates their intended effect.

C. Use Of The Effective Date Of Title VII In A Pattern Or Practice Charge Without Any Factual Basis Indicating Why It Was Considered To Constitute A "Good Faith Estimate" Of The "Date" Is Not Meaningful, Does Not Provide Proper "Notice," And, Therefore, Does Not Meet The Requirements of Section 706(b).

As observed at pp. 14-17, *supra*, the 1972 legislative history, and particularly the compromise in the Conference Committee concerning Commissioner's charges, indicates that the required notice to respondents was intended to be meaningful and not merely perfunctory. A

meaningful date is essential to provide adequate notice to enable the respondent to "preserve all personnel records relevant to the charges or action," 29 C.F.R. § 1602.14(a), and to enable a court in a subpoena enforcement action to determine relevancy. *See EEOC v. K-Mart Corp., supra*, 694 F.2d at 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1338.

The date in an individual's charge is typically meaningful because it relates to a specific, identifiable event (date of termination, rejection, denial of promotion, etc.). On the other hand, because of its inherent nature, a Commissioner's charge of a pattern or practice violation may not be susceptible of such precision with respect to dates. In the case of a Commissioner's pattern or practice charge, a "good faith estimate" of the probable dates of the alleged violations has been recognized as the only practical way of meeting the date requirement. *See EEOC v. K-Mart Corp., supra*, 694 F.2d at 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1338. Nonetheless, even this good faith estimate must be "meaningful." The decision below logically required the Commission to set out in the charge or notice[25] an objective (factual or statistical) basis why it considers the date given to constitute a "good faith estimate" of the dates of the alleged violations.[26]

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[25] The Eighth Circuit noted that while it was unclear from the language of Section 706(b) whether the notice of "date, place and circumstances" should be in the charge itself or in the notice of the charge, "[t]he better practice would be to include the date, place and circumstances in the charge itself." 676 F.2d at 325 n.3. *See also EEOC v. K-Mart Corp., supra*, 694 F.2d at 1062, 1064; *EEOC v. Dean Witter Co., Inc., supra*, 643 F.2d at 1337 n.2.

[26] A recent decision by a divided panel of the Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, —— F.2d ——, 32 FEP Cases 279 (7th Cir. 1983), concluded that the employer had not demonstrated that the use of the effective date of the Act in that case was improper. The central issue in *Staley* apparently was whether the Commission had a *pro forma* policy of inserting the

The Solicitor's argument that the Commission's good faith must be presumed (Pet. Br. 39) is unpersuasive for two reasons. First, blind deference by courts to a "presumption" of good faith is inappropriate in light of the previously cited instances of the Commission's disregard for express statutory safeguards. *See* pp. 22-24, *supra*. As this Court noted in *Mohasco Corp. v. Silver*, *supra*, 447 U.S. at 826, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Second, to insure that its subpoena enforcement powers are not abused, a court should inquire into this presumption when there are non-frivolous, affirmative indications that the date may not be a good faith estimate.

In this latter regard, it is significant that the Department of Interior/Office of Equal Opportunity (acting as agent for the predecessor of the OFCCP) had conducted a desk audit and on-site compliance review of Shell's Wood River facility during the period from 1973 to 1975 and found the facility to be in compliance with Executive Order 11246.[27] Since E.O. 11246 contains not only a non-

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effective date of the Act in Commissioner's charges. *Id.* at 284. The district court, after a hearing, "accepted the statements of the EEOC that there was no *pro forma* insertion of the effective date of the act in this case," *id.*, and the Seventh Circuit determined that the district court decision was not clearly erroneous. The issue here, however, is whether the date included in a Commissioner's charge is a good faith estimate of the probable time periods of the alleged unlawful employment practices which is supported by some basis in fact. To the extent that the *Staley* decision can be read as allowing the inclusion of a date in a Commissioner's charge which has no basis in fact, it should be rejected as inconsistent with the oath and notice provisions of Section 706(b).

[27] 30 Fed. Reg. 12319 (1965), *as amended* by Exec. Order 11375, 32 Fed. Reg. 14303 (1967), and Exec. Order 11478, 34 Fed. Reg. 12985 (1969), *reprinted in* 42 U.S.C. § 2000e (1981) at 19, *et seq.*

discrimination requirement which is virtually identical to the one contained in Title VII, but also an "affirmative action" requirement, it is *highly* unlikely, if not impossible, that Shell could have been in compliance with E.O. 11246 during that time period if it had been engaging in the widespread discriminatory practices alleged in the instant charge. Shell referred the Commission (and the district court by way of exhibits) to the results of this compliance review. (J.A. 90). Moreover, the Commission has access to such information through a Memorandum of Understanding with the OFCCP, *see Emerson Electric Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979); the Commission is obligated by law to avoid unnecessary duplication of federal employment discrimination enforcement, *see* Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), and Executive Order 12067, 44 Fed. Reg. 1055 (1978); and such information therefore should have been reviewed prior to the issuance of the charge, *see* EEOC Compliance Manual (BNA) § 16.3 (c) and (e). In these circumstances, the use of a time period which encompassed 1973-75 affirmatively suggests a lack of a factual basis and, hence, a lack of the requisite good faith estimate of the date.

For the first time in this entire litigation, the Solicitor in his brief on the merits before this Court sought to provide some explanation why the amended date might constitute a "good faith estimate." (Pet. Br. 26-27). Such a belated attempt, however, falls far short of a proper meaningful "date." First, this "explanation" is not in the charge; is not on the record; and, accordingly, is at best hearsay. It was not sworn to by anyone, let alone the person who allegedly had knowledge enough to file the charge. Second, the "explanation" consists only of conclusory and result-oriented verbiage. It does not present any objective, verifiable information. A court called upon to enforce a subpoena would not be able to rely

upon this "explanation" to find that the date in fact reflected a "good faith estimate."

The Solicitor maintains that the "date" should not create any concerns regarding an open-ended investigation, since the administrative subpoena sought only information for the period from 1976 to 1980. This argument totally misses the point of the statutory requirement. The requirement exists to place the respondent on "notice"; to enable the respondent to preserve documents pursuant to the EEOC regulation requiring such;[28] and to enable a court, called upon to enforce a subpoena, to determine relevancy and materiality.[29]

As a practical matter, the Sixth Circuit noted in *K-Mart*, *supra*, 694 F.2d at 1064 n.8, that the inclusion of the effective date provides no real guidance on the temporal scope of the investigation to the EEOC district directors who normally prepare and issue the subpoenas. Without a more meaningful approximation of the probable dates, district directors would be left to make discretionary interpretations of the appropriate temporal scope of subpoenas. The Commission was not vested by Congress with such discretion, as it would be tantamount to the "almost unbridled discretion [of] executive and administrative officers, particularly those in the field"

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[28] *See*, p. 25, *supra*.

[29] Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a), entitles the Commission only to information that is relevant to the charge:

> In connection with any investigation of a charge filed under section [706] of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that *relates to* unlawful employment practices covered by this Subchapter and is *relevant to* the charge under investigation. (Emphasis added).

which this Court was so careful to curb in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Finally, notwithstanding any restriction on the time period involved in an initial request, such an open-ended date would not prevent the Commission from a subsequent request for information going back to July 2, 1965, nearly fifteen years prior to the date of the charge.[30]

D. A Statement Of Conclusory Allegations Of Discrimination Without Any Accompanying Factual Or Statistical Basis Does Not Set Forth Circumstances Which Are Meaningful And Verifiable For Purposes Of Oath And Notice.

As previously noted, statutory words are to be given their common meaning unless there is some contrary evidence of Congressional intent. There is no legislative history to define "circumstances." Dictionary definitions use words such as "attendant or accompanying facts" [31] or "a fact or event accompanying another." [32] Consistent with this common usage, the Eighth Circuit determined that "[a]s with the date requirement, we read this to require the statement of circumstances to be supported by some factual or statistical basis." 676 F.2d at 325-26. The decision of the Eighth Circuit merely implemented the clear statutory requirement that a charged party be informed in a reasonably specific manner of the circumstances of al-

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[30] The Solicitor has argued that if a Commissioner cannot use the effective date of the Act as the "date" in a Commissioner's charge "the worst offender under Title VII—the employer that had never acted to integrate its segregated workforce after the passage of Title VII—could not be accurately charged under the Act simply because of the extent of its discrimination." (Pet. Br. 31 n.25). In such an instance, however, the Commissioner should have no difficulty in setting forth in the charge a sufficient explanation for his or her use of the July 2, 1965 date.

[31] *Black's Law Dictionary*, Fifth Edition (West Publishing Co. 1979).

[32] *Webster's New World Dictionary* (Simon & Schuster 1980).

leged violations and not just the alleged violations themselves. The Eighth Circuit further reasoned that "[a] charge which simply alleges discrimination in all areas of employment practice without some factual or statistical basis . . . fails to give the employer sufficient notice." *Id.* at 326. Since the Commissioner's charge against Shell did not set forth any factual basis for its litany of discriminatory employment practices, the charge did not provide any meaningful or verifiable information to Shell or a court and failed to meet the oath and notice requirements of Section 706(b).

The Solicitor argues that the Eighth Circuit's opinion has created technical pleading requirements and that it would require the Commission to establish "probable cause" or "reasonable cause" in order to secure enforcement of a subpoena. (Pet. Br. 14, 21, 23, 32). The Court should look beyond such labeling. The Eighth Circuit merely recognized and applied the plain meaning of the word "circumstances." That word was chosen by Congress, not the Eighth Circuit. It was not superfluous verbiage but, instead, has an important role in this congressional scheme. By requiring that the "circumstances" of the alleged unlawful employment practices be disclosed to the charged party, Congress sought to ensure that the Commission would not initiate investigations unless it first possessed facts upon which it could make sworn allegations of discrimination. The facts were to be made known to the employer and any reviewing court in order to prevent a Commissioner from issuing unauthorized charges and to delineate the relevant and material scope of the investigation, including subpoenas issued in furtherance of the investigation. If the Commission were not required to state the factual basis for its charge, there would be no objective verifiable method for determining whether it had authority to investigate. Indeed, the express statutory requirements of oath and notice would be rendered meaningless.

The Solicitor also relies upon *K-Mart* and *Dean Witter* to support his characterizations. Besides misinterpreting the statutory requirements, each court's opinion must be placed in its own context. The Sixth Circuit in *K-Mart* was faced with the issues of oath and date, and the proper statutory construction of the word "circumstances" was neither briefed nor argued before the court. Its rejection in a footnote of the Eighth Circuit's holding that "some basis in fact" is required (694 F.2d at 1063 n.7) is clearly dictum. To whatever extent the court may have considered the "circumstances" requirement, it erred in equating "some basis in fact" with "probable" or "reasonable cause."

In *Dean Witter*, the Ninth Circuit assumed that the Commissioner's charge was based upon a charge by an aggrieved individual who wished to remain anonymous. In this context the court feared that additional circumstances might disclose the identity of the individual on whose behalf a charge was brought:

> [A] rule requiring the EEOC to disclose the information that is the basis for a Commissioner's charge would tend to defeat *the purpose* behind the Commissioner's charge, which is to enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals. (Citations omitted) (emphasis added), 643 F.2d at 1339.

The Commission has conceded that there is no underlying aggrieved individual in Shell's case. Rather, the charge was prompted by the staff of the EEOC in its Office of Systemic Programs. Therefore, *Dean Witter* is not analogous to the instant case.

The Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, *supra*, 32 FEP Cases at 283-84, also has interpreted the Eighth Circuit's *Shell* decision erroneously as requiring the Commission to demonstrate reasonable or probable cause in order to have its subpoena

enforced. As shown above, however, the Eighth Circuit did not impose a probable or reasonable cause standard, but merely required some "factual basis for the Commissioner's belief that a Title VII violation has occurred." 676 F.2d at 326.

These courts failed to recognize the critical link between the oath and circumstances provisions of 706(b). Instead, they have adopted the Commission's argument that no factual basis for a charge is necessary since the Commissioner must swear to a belief under oath. The fallacy of this "good faith" argument is that it renders the oath protection meaningless. Without revealing some factual basis, a Commissioner can allege mere beliefs without incurring the accountability intended by the oath requirement of Section 706(b). As the Eighth Circuit stated:

> We do not doubt that the Chair of the Commission may have some basis for her statement that she believes the employer has violated Sections 703 and 707 of the Civil Rights Act of 1964. However, we believe the law requires additional factual material to comply with section 706(b) and 29 C.F.R. § 1602.14(a) (1981). 676 F.2d at 326.

The Solicitor also cites a number of other cases to support his contention that the "circumstances" requirement of Section 706(b) does not require some factual basis in support of alleged violations. *See New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160 (5th Cir. 1975); *Mountain States Telephone & Telegraph Co. v. EEOC*, 466 F.2d 541 (10th Cir. 1972); *Adolph Coors Co. v. EEOC*, 464 F.2d 1270 (10th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *Sparton Southwest, Inc. v. EEOC*, 461 F.2d 1055 (10th Cir. 1972) (*en banc*); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971); *Local 104, Sheet Metal Workers v. EEOC*, 439 F.2d 237 (9th Cir. 1971); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.), *cert. denied*,

400 U.S. 942 (1970). *Each* of these cases, however, involved charges issued prior to the 1972 Amendments to Title VII. Since the charge-filing requirements were substantially altered in 1972 to require that a Commissioner's charge be under "oath or affirmation" and include the "date, place and circumstances" of alleged violations, these pre-amendment cases simply are not instructive.[33]

The Solicitor has failed to provide any evidence that Congress intended that the plain meaning of "circumstances" be ignored. After reflection upon the overall purpose of Section 706(b), it is clear that the Eighth Circuit's requirement that "some factual basis" for the charge must be provided is necessary to ensure that the safeguards created by Congress are effectively maintained.

II. THE COMMISSION'S LIMITED AUTHORITY TO COMMENCE AN INVESTIGATION OR TO HAVE A SUBPOENA ENFORCED ONLY AFTER A VALID CHARGE IS FILED SHOULD NOT BE CONFUSED WITH OTHER AGENCIES' BROADER AUTHORITY.

As noted above, unlike other federal agencies, the EEOC is without authority to commence an investigation in the absence of a valid charge of discrimination. By equating the authority of the EEOC with that of other federal agencies which have been given broad discretion to initiate investigations, the Solicitor has failed to acknowledge this fundamental limitation on the EEOC's

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[33] In addition, two of the Solicitor's cases expressly equate the authority of the EEOC with that of the FTC. *See Local 104, supra*, 439 F.2d at 242; *Bowaters, supra*, 428 F.2d at 800. As already noted, Congress specifically observed that the EEOC's investigatory authority was not equivalent to the FTC's. *See* pp. 10-11, *supra*. In one other decision, *New Orleans Public Service*, the case involved six individual charges as well as a Commissioner's charge. 507 F.2d at 162. Thus, none of the pre-amendment cases cited by the Solicitor even addresses the issue present in the instant case.

power. This failure is most evident in the Solicitor's reliance on this Court's decision in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"). By arguing that *Socal* prohibits a court from reviewing the legal sufficiency of a Commissioner's charge, the Solicitor has ignored the fact that a court that is asked to enforce an EEOC subpoena *must* first determine that there is a valid charge, since in the absence of such a valid charge the Commission is without authority to issue or have enforced a subpoena. Finally, the Solicitor has overstated vastly the potential effect of this case on other federal agencies.

A. The EEOC's Investigative Authority, As Limited By Section 706(b), Cannot Properly Be Equated With That Of Other Civil Rights Enforcement Agencies.

The limited, charge-based investigative authority of the EEOC is in contrast to the essentially self-initiating authority of many other federal agencies. The manner by which the Commission may exercise its investigative authority is quite different from the authority of the two other federal agencies with primary responsibility for enforcing equal employment opportunity laws and regulations, the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor and the Department of Justice.

In carrying out its responsibilities under Executive Order 11246, the OFCCP need not have received any allegation of a violation of the Executive Order but can commence an investigation on its own initiative in order to determine if a government contractor is complying with the Executive Order. *See* Executive Order 11246, §§ 206 (a), 208, 209, *reprinted in* 42 U.S.C. § 2000e (1981) at 21-22.

The Department of Justice has authority under Title VII to file "pattern or practice" suits against state and

local governments "[w]henever the Attorney General has *reasonable cause to believe* that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." Section 707(a), 42 U.S.C. § 2000e-6(a) (emphasis added). Thus, the Department of Justice has self-starting "pattern or practice" authority in the public sector. Unlike EEOC, the authority of the Department of Justice is not dependent on a valid charge of discrimination, nor is the Department of Justice expressly required to adhere to the other administrative prerequisites set out in Section 706 of Title VII.

By contrast, EEOC's authority is limited. Pursuant to the 1972 Amendments to Title VII, Section 707(e), 42 U.S.C. § 2000e-6(e), authorizes EEOC "to investigate and act on a *charge* of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." (Emphasis added). Further, Section 707(e) expressly provides that "[a]ll such actions shall be conducted in accordance with the procedures set forth in section [706] of this title." Thus, despite the Commission's preference for independent pattern or practice authority, see Testimony of William H. Brown, III, Chairman of EEOC, Legislative History of the Equal Employment Opportunity Act of 1972 at 932 (1972), Congress in 1972 expressly declined to grant such authority and restricted the Commission to investigating and acting upon valid charges of discrimination.[34]

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[34] The Senate clearly recognized the distinctions between the audit function of the OFCCP and the EEOC's function of investigating specific complaints. Legislative History of the Equal Employment Opportunity Act of 1972 at 915. Senator Williams argued that the transfer of OFCCP audit authority to EEOC was required to coordinate their respective activities. *Id.* at 919. Senator Saxbe proposed an amendment to delete from the Senate bill a provision to transfer the OFCCP audit functions to the EEOC and instead create the Equal Employment Opportunity Coordinating Council.

In addition, as noted *supra*, pp. 10-11 and n.12, the legislative history of the 1964 Act clearly distinguishes the authority of EEOC from the broader investigatory powers of other agencies such as the FTC and the Wage and Hour Administrator of the Department of Labor.[35]

B. *Socal* Does Not Prohibit A Court In An EEOC Subpoena Enforcement Action From Reviewing The Validity Of A Commissioner's Charge, Since Unlike The FTC, The EEOC's Investigatory Authority Is Contingent Upon The Filing Of A Valid Charge Under Section 706(b).

The Solicitor argues that this Court's decision in *Socal* mandates that the Commissioner's charge at issue herein is "not subject to routine judicial oversight, precisely because it is merely a preliminary step that signals the commencement of an agency investigation." (Pet. Br. 44). The Solicitor's attempt to apply the principles of *Socal* to the instant case, however, is unavailing. As set forth above, the commencement of an EEOC investigation is not committed to agency discretion, but rather may proceed only on the basis of a valid charge of discrimination.

Socal involved a challenge to the issuance of a complaint by the FTC pursuant to Section 5(b) of the Fed-

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Id. at 937. This amendment was passed and enacted into law. In 1978 the Council was abolished and its coordinating function was transferred to the EEOC. *See* Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), 92 Stat. 3782, and Executive Order 12067, 44 Fed. Reg. 1055 (1978). *See* also 42 U.S.C. § 2000e-14.

[35] The Solicitor has cited *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. 186, for the proposition that "federal courts should not probe the 'factual basis' of Commission charges any more than they should second guess whether the FTC has properly issued an administrative complaint." (Pet. Br. 43). The legislative history of Title VII *expressly* cited *Oklahoma Press Publishing Co.* as an indication of the investigatory authority which the EEOC would *not* have. *See* p. 11, *supra*.

eral Trade Commission Act, 15 U.S.C. § 45(b). Section 5(b) authorizes the FTC to issue a complaint where it has "reason to believe" that a company is engaged in acts prohibited by the statute, and where "it shall appear to the [FTC]" that a proceeding by it would be in the interest of the public. Thus, Section 5(b) commits the commencement of an administrative action to the discretion of that agency. Under the circumstances in *Socal*, this Court held that the issuance of the complaint was not subject to judicial review before completion of the administrative process. It is clear, however, that Congress did not intend for EEOC to possess such self-starting investigative power. *See* discussion at pp. 10-12 and 34-36, *supra*. Rather, Congress intended that the authority of the Commission would commence *only* with the filing of a valid charge of discrimination meeting the requirements of Section 706 (b). Thus, the requirements of Section 706(b) are not "threshold determinations" as in *Socal* but, instead, are conditions precedent which must be met in order to satisfy the express requirements of the statute. Since this case involves the "purely legal question of jurisdiction," the policies underlying this Court's decision in *Socal* simply do not apply. *United States v. Cabrini Medical Center*, 639 F.2d 908, 910 (2d Cir. 1981). It is clear that a court which is asked to enforce a Commission subpoena *must* determine that the subpoena is based on a valid charge in order to avoid abusing its discretion. *United States v. Powell*, 379 U.S. 48, 58 (1964); *EEOC v. K-Mart Corp.*, *supra*, 694 F.2d at 1061; *EEOC v. Dean Witter Co., Inc.*, *supra*, 643 F.2d at 1337-38; *Graniteville Co. v. EEOC*, *supra*, 438 F.2d at 35; *EEOC v. Union Bank*, *supra*, 408 F.2d at 870. Thus, once the Commission commenced the subpoena enforcement action herein, the district court was *required* to determine the validity of the charge before it could decide the Commissioner's subpoena enforcement application. The limitations of judicial re-

view set forth in *Socal* would be in direct conflict with this judicial duty. Therefore, the *Socal* holding cannot apply to this case.[36]

C. The Solicitor Has Overstated The Effect Of A Decision In This Case On The Commission And Other Agencies.

The Solicitor's intimation (Pet. Br. 44-46) that the decision in this case could affect the functioning of a large number of federal agencies which are authorized to act upon a determination of "reasonable cause" or "reason to believe" a violation exists again reflects his failure to distinguish the authority of the Commission from that of other federal agencies. The Commission is *not* authorized to act upon a "reasonable cause" or "reason to believe" standard, but rather upon adherence to the charge-filing requirements of Section 706(b). The requirements of Section 706(b) are the *only* requirements at issue and a

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[36] Assuming *arguendo* that the decision in *Socal* is relevant and material to the issues in the instant case, the Solicitor's analysis is incorrect. The Solicitor must first apply the principles underlying the ripeness, finality and exhaustion of remedies doctrines to the facts in this case instead of summarily applying the *Socal* result. There are four fundamental factual differences. First, the FTC and EEOC differ in authority granted by Congress. Second, the standards for an FTC complaint and Section 706(b) requirements for a valid charge are different. Third, Socal asked the Court to speculate whether the FTC had reasonable cause. Shell, on the other hand, requests the court to enforce the provisions of Section 706(b) and require a charge to contain sufficient information, susceptible of verification, to enable the statutory oath and notice requirements to be meaningful. Fourth, unlike Socal, Shell has raised these issues in judicial subpoena enforcement proceedings. Thus, internal agency procedures were exhausted and the matter was taken to federal court. The issue of whether the EEOC had statutory authority to request subpoena enforcement in the absence of a valid charge is certainly ripe. If the courts enforce a subpoena issued by the EEOC without authority, irreparable injury would occur. Thus, the elements of finality are also present in this case.

decision in this case should not affect the other agencies listed by the Solicitor.

This Court rejected similar arguments by the Solicitor in *Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 321-22, when it stated that "[i]n short, we base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes." As in *Barlow's*, it is submitted that this Court should limit its consideration to the requirements of Section 706(b) and should not be swayed by the Solicitor's arguments regarding "different administrative schemes."

III. GUIDANCE BY THIS COURT IS ESSENTIAL TO PREVENT FUTURE LITIGATION OVER THE AMOUNT OF DETAIL PROVIDED IN A COMMISSIONER'S CHARGE.

For the reasons discussed in this brief, this Court should affirm the decision below that Section 706(b) requires a charge to disclose a meaningful statement of the date, place, and circumstances of the alleged unlawful practices to enable the respondent to preserve documents and to enable a court called upon to enforce a subpoena to determine relevancy and materiality. This is especially essential in a statistically-based Commissioner's charge of a pattern or practice violation.

The actions of the Commission and the Solicitor in this case vividly illustrate the need for added clarification of the decision below to avoid unnecessary continued litigation arising out of the Commission's misinterpretation of the Eighth Circuit's holding. First, after the Eighth Circuit's original decision, the Commission's petition for rehearing attempted to "clarify" any uncertainty about the "circumstances" by indicating that the charge was based on the criteria for targeting subjects for "systemic inquiry" under its Office of Systemic Programs. *See* Pet. App. 40a-43a. Such a general "clarification", however, merely

demonstrated the Commission's continued unwillingness to disclose any meaningful information, because it did not specify which criterion (or criteria) had been used and how it (they) had caused the Commissioner to believe the alleged violations might exist. Second, in his Reply Brief to Shell's Response to the Petition for Certiorari, the Solicitor introduced statistical "data" which he implies constituted "the basis for the commissioner's charge in this case." (Pet. Reply Br. at 3 n.3). The Solicitor's "data", however, were not in the charge, were not sworn to, and are not properly a part of the record in this case. Accordingly, there is no way of knowing whether these data were, in fact, ever considered by the Commissioner who issued the charge. Moreover, the Commission continues to deny that it has any obligation to provide this, or any other specific data, in support of such a charge.[37]

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[37] The Solicitor attempts to justify his improper introduction of statistics at this stage on the ground that this was necessary in order to respond to statistics Shell had introduced in the district court. The Solicitor also accuses Shell of attempting to engage in a "mini-trial" of the merits at the subpoena enforcement stage. (Pet. Br. at 37 n.30). These contentions are without merit. Shell introduced its statistics in the district court solely to show that its request for discovery of the factual basis for the Commissioner's charge was not frivolous or in bad faith. *See* pp. 26-27, *supra*. It is the Solicitor, not Shell, who has attempted to use statistics to argue the merits of the charge.

Under the circumstances, Shell feels compelled to respond to the Solicitor's misleading statistical data. The statistics presented by the Solicitor improperly used data based on the St. Louis Standard Metropolitan Statistical Area (SMSA) for 1978 as a means for judging Shell's compliance with the Act. The federal government previously had recognized and agreed that since the refinery was located at the far edge of the St. Louis SMSA, the appropriate labor market area for locally-recruited employees is not the entire SMSA; rather, it consists of three of the eight counties in the SMSA plus the City of St. Louis and three other counties which lie outside of the SMSA. (J.A. 90). In addition, Shell's representation in EEO-1 Job Categories is compared for each year from 1970-78 with the 1978 SMSA availability. Such a comparison failed to take into account that Shell's 1970 representation properly should be

Third, as discussed at pp. 27-28, *supra*, the Solicitor has attempted in his Brief on the Merits to this Court to explain why the Commissioner considered July 2, 1965, to be a good faith estimate of the required date. Again, there is no way of knowing whether this extra-record explanation reflects the Commissioner's thinking, as it was not in the charge or under oath. In any event, this explanation was not meaningful because it was totally subjective and consisted only of conclusory statements.

Clearly, some guidance from this Court is needed to enable the parties and the lower courts to understand fully how the requirements of Section 706(b) are to be applied in cases involving statistically-based Commissioner's pattern or practices charges of discrimination.[38]

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compared to 1970 availability, which could be significantly different from the 1978 availability. The comparison set forth also fails to take into account the numbers of persons who were either hired prior to the effective date of the Act or before the relevant time period for liability. *See Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977); *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 341; *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Movement for Opportunity v. General Motors*, 622 F.2d 1235, 1245 (7th Cir. 1980). The Solicitor's own comparison, even though based on an inappropriate relevant labor market, indicates that Shell's representation in certain EEO-1 Job Categories exceeded availability in the SMSA. *Compare, e.g.*, 5.3% representation of blacks among Shell's "professional" employees to the Solicitor's alleged 4.5% availability for black professionals in the SMSA.

[38] Should the Court undertake to render such guidance, Shell respectfully submits for the Court's consideration the following elements:

(a) the source(s) of the statistics relied upon by the Commissioner,

(b) the date(s) of the statistics,

(c) identification of the labor market used to determine the availability data and the source(s) of that data, and

The more information an employer is given regarding the "date, place and circumstances" in the charge, the earlier the employer will be able to produce relevant materials and the greater the potential for meaningful discussion of those materials. As the Eighth Circuit noted, by providing some factual basis for the charge, the Commission will enable the parties to determine whether conciliation would be appropriate. 676 F.2d at 326. The Solicitor contends that such notice was not intended to enable the parties to determine whether conciliation might be appropriate because "conciliation" of charges occurs after the Commission has completed its investigation and issued a finding of "reasonable cause." (Pet. Br. 34 n.27). As this Court noted in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 n.5 (1981), however, "[i]n most cases, the Commission actually begins its attempt to achieve a negotiated settlement *before* it makes a reasonable-cause determination. 20 C.F.R. § 1601.20 (1979); EEOC Compliance Manual § 15." (Emphasis added).[39] Accordingly, it is clear that the statutory notice requirement enforced by the Eighth Circuit is consistent with the policy of Title VII to achieve prompt, voluntary compliance with the Act, regardless of when the formal conciliation process begins. *See Ford Motor*

(d) identification of the job categories used for availability comparisons.

This type of information should be readily available to the Commission in all statistically-based Commissioner's pattern or practice charge cases and could be provided by the Commission without any interference and/or burden to its functions under Ttitle VII. *See* EEOC Compliance Manual (BNA), § 16.

[39] 29 C.F.R. § 1601.20 states as follows:

(a) *Prior to the issuance of a determination as to reasonable cause*, the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors and the . . . Director of Systemic Programs . . . shall have the authority to sign any settlement agreement which is agreeable to both parties. (Emphasis added).

Co. v. EEOC, 102 S.Ct. 3057, 3064 (1982); *United Steelworkers of America v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); Legislative History of the Equal Employment Opportunity Act of 1972 at 227 (1972).

CONCLUSION

For the foregoing reasons, Shell respectfully submits that the decision of the Eighth Circuit herein should be affirmed.

Respectfully submitted,

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July 22, 1983

APPENDIX A

Parent Companies and Affiliated Companies
of
SHELL OIL COMPANY

Basin Pipe Line System
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Pipeline Corporation
Crown-Shell Baytown Feeder Line System
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Gravcap, Inc.
Heat Transfer Research Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
George Newman & Company
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Quazite Corporation
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Ltd.
Ship Shoal Pipe Line System
Thums Long Beach Company
United Scientific, Inc.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
WASHINGTON, D.C. 20506

072800036

COMMISSIONER'S CHARGE

Pursuant to the provisions of Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq, (Supp v. 1975) I charge the following employer with unlawful employment practices:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois 62095

I believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service workers positions because of their race.

2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex.

The persons aggrieved include all Blacks and women who are, have been or might be affected by the unlawful employment practices complained of herein.

District of Columbia, ss:

I, ELEANOR HOLMES NORTON, being duly sworn, depose and say that I am a Commissioner of the Equal Employment Opportunity Commission and that I have cause to believe that Shell Oil Company has committed the unlawful employment practices set forth in the foregoing charge.

/s/ _____
ELEANOR H. NORTON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th DAY OF SEPTEMBER 1979.

/s/ _____
CORA O. DIXON
Notary Public

My Commission expires September 14, 1981.

APPENDIX C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20506

AMENDMENT TO COMMISSIONER CHARGE

On September 27, 1979, I signed a Commissioner charge against:

Shell Oil Company
Wood River Refinery
P.O. Box 262
Wood River, Illinois

When I signed the charge I intended to cover all the unlawful employment practices identified therein occurring from July 2, 1965, continuing through at least the date of the charge, and I believe that the charge as written did cover that time period. Nevertheless, to clarify any possible ambiguity that may exist in view of the decision in *EEOC v. Dean Witter Co.*, 621 F.2d 1012 [sic] (9th Cir. 1980), I hereby amend the original charge, which is incorporated here by reference, to state that I have reason to believe that the named employer had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present.

I swear or affirm that I have read the above amendment and that it is true to the best of my knowledge, information and belief.

/s/ _____
ELEANOR H. NORTON
Commissioner

Subcribed and sworn to before me this 16th day of January, 1981.

FILED
OCT 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent argues that a commissioner's charge must detail its factual basis because in 1964 Congress intended "to restrict the investigative powers of the Commission" (Resp. Br. 9) and in the 1972 amendments to Title VII made the requirements for a commissioner's charge even "more stringent" (*id.* at 14). This submission, however, is at odds with the plain language of Section 706(b), 42 U.S.C. 2000e-5(b), its legislative history, and—except for the decision of the court below—all case law interpreting the section. See Pet. 9-10; Pet. Br. 18-19, 23-26. Indeed, since our opening brief, yet another court of appeals has rejected the position of the respondent and the court below. *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d 780 (7th Cir. 1983), petition for cert. pending, No. 83-401. It is, in sum, quite clear that Section 706(b) does not require a detailed "factual basis" (Pet. App.

7a, 8a) for the allegations contained in a commissioner's charge. See, *e.g.*, *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055, 1063 n.7 (6th Cir. 1982).

I

A. Employers have repeatedly made the argument, advanced once again by the respondent (Resp. Br. 10-14), that Congress in 1964 intended to deny the Commission broad investigatory powers.[1] That contention, however, has been soundly rejected.[2] Indeed, the 1964 legislative history demonstrates that, contrary to respondent's suggestion (Resp. Br. 5, 12-13), Congress did not limit the Commission's authority to investigation of specific charges of discrimination filed by individual complainants. Rather, the debate on Title VII demonstrates that one reason Congress empowered the Commission to file commissioners' charges was to authorize investigation into instances of systemic discrimination.[3] Thus, contrary to

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[1] As we have previously noted (Pet. Br. 21 n.13; Pet. Reply Br. 9), the issue whether the Commission possesses the authority to investigate respondent's employment practices is not properly before the Court.

[2] See, *e.g.*, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 39 (4th Cir. 1971); *Local 104, Sheetmetal Workers* v. *EEOC*, 439 F.2d 237, 242 (9th Cir. 1971); *Motorola* v. *McLain*, 484 F.2d 1339, 1345 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

[3] In response to an attempt by Senator Ervin to delete the commissioner's charge provision of Title VII, Senator Pastore argued that:

> The elementary question is whether we want to leave the institution of a charge strictly and solely to the individual, or whether we want to give the power to the Commission, or to the members of the Commission, to initiate a complaint where there is possibly a pattern of discrimination in employment practices.
>
> * * * * *
>
> [I]f we mean to do anything at all about this problem in the public interest, we must give the authority to a member of the

respondent's contention (Resp. Br. 12-13), Congress did not grant the EEOC the authority to file commissioners' charges for the "sole reason" of protecting claimants who might be fearful of reprisal. Even in 1964, Congress recognized that a commissioner's charge could be utilized to alleviate instances of systemic discrimination that may not be readily identifiable on the basis of individual complaints alone. See *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d at 38.[4]

In any event, the 1972 amendments to Title VII make it abundantly clear that the Commission has broad discretion to initiate investigations into suspected instances of systemic discrimination. By the early 1970's, Congress had become aware that employment discrimination was a "complex and pervasive phenomenon," attributable to "systems" and "effects" rather than simply to individual and intentional ill-will. H.R. Rep. 92-238, 92d Cong., 1st Sess. 8 (1971); S. Rep. 92-415, 92d Cong., 1st Sess. 5 (1971). Congress further believed that "[u]nrelenting broad-scale action against patterns and practices of discrimination is * * * critical in combatting employment

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Commission to initiate a charge where he feels that there is a pattern of discrimination. The Commission can then investigate it.

110 Cong. Rec. 14189 (1964), *reprinted in Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3306 (1968).

[4] Respondent's assertion that "[t]he courts in cases involving a Commissioner's charge, until this one, apparently assumed that the Commissioner's charge at issue was based on an underlying individual charge * * * filed by a person who wished to remain anonymous" (Resp. Br. 13, n.14) is baseless. Most cases in fact give no indication that the court made any such assumption (see, *e.g.*, *Sparton Southwest, Inc.* v. *EEOC*, 461 F.2d 1055 (10th Cir. 1971) (en banc); *General Employment Enterprises, Inc.* v. *EEOC*, 440 F.2d 788 (7th Cir. 1971); *Mountain States Telephone & Telegraph Co.* v. *EEOC*, 466 F.2d 541 (10th Cir. 1972)), and at least one court has expressly held that a commissioner's charge is not defective because it does not rest upon "a particular instance of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 240.

discrimination," and it recognized that "[t]he Commission is best able to determine where 'pattern or practice' litigation is warranted" because "[i]t has access to the most current statistical computations and analyses regarding employment patterns." H.R. Rep. 92-238, *supra*, at 14. Accordingly, Congress empowered the Commission "to deal comprehensively with systemic discrimination." *Ibid.* The EEOC was granted the authority to initiate and investigative charges of a pattern or practice of discrimination based on its statistical records, and it was permitted—for the first time—to pursue those charges in court. 42 U.S.C. 2000e6(c)-(e).[5] This broad expansion of the Commission's authority contradicts respondent's assertion (Resp. Br. 35-36) that Congress intended to circumscribe narrowly the authority of a Commissioner to file a charge based upon a suspected pattern or practice of discrimination. See generally *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 358-373 (1977).[6]

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[5] Prior to the 1972 amendments, the Commission was not authorized to bring employment discrimination litigation.

[6] As noted by respondent (Resp. Br. 16), the Senate version of the 1972 amendments provided that charges were to be filed "upon the request of any person claiming to be aggrieved." 118 Cong. Rec. 4944 (1972). The Senate Committee on Labor and Public Welfare, however, made it clear that this provision was not intended to limit commissioners' charges to individual claims of discrimination (S. Rep. 92-415, 92d Cong., 1st Sess. 27 (1971)), and, in any event, the Senate receded to the House bill, which deleted the "upon request of any person * * * aggrieved" language of the bill. Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1814, 1836 (Comm. Print 1972) (hereinafter cited as 1972 Leg. Hist.).

The respondent's related assertion that Congress restricted the Commission's authority in 1972 "despite the Commission's preference for independent pattern or practice authority" (Resp. Br. 35) rests upon a misinterpretation of the legislative history of the 1972 amendments. The testimony of Chairman William H. Brown that is relied upon by respondents (Resp. Br. 35) came at a time when Congress was considering conferring cease and desist authority

B. Respondent's submission that the Commission's "charge-based investigatory authority" is inherently limited (Resp. Br. 7) is no more persuasive than the argument it attempts to wrench from the legislative history of Title VII. Although Commission investigations are "charge-based," the EEOC has the unchallenged authority to initiate its own charges (42 U.S.C. 2000e-5(b)) and that power extends to claims which allege a pattern or practice of discrimination (42 U.S.C. 2000e-6(e)). And, contrary to respondent's submission, this "self-initiating authority" (Resp. Br. 7) unquestionably bestows substantial investigatory powers upon the Commission. Indeed, the Commission possesses "the same investigatory authority as is contained in the National Labor Relations Act" (S. Rep. 92-681, 92d Cong., 2d Sess. 19 (1972)), and this Court has recognized that the National Labor Relations Board has "broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 308 (1959). See 42 U.S.C. 2000e-8(a), 2000e-9.[7]

Thus, respondent's argument that the Commission's investigatory authority is "limited" because it depends upon the issuance of a "valid" charge (Resp. Br. 35) overlooks the fact that the Commission plainly has the authority

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upon the Commission. The Chairman's testimony was to the effect that cease and desist procedures were not the best means of processing pattern or practice actions. He testified that, should the Commission be given authority to bring pattern or practice claims before a federal court, the Commission should be authorized to bring suit directly rather than rely on enforcement of a cease and desist order. 118 Cong. Rec. 1393 (1972); 1972 Leg. Hist. 932. The fact that this recommendation was ultimately adopted does not demonstrate that Congress intended to "restrict" the investigative powers of the Commission.

[7] Since 1972, the courts of appeals have consistently equated the EEOC's investigatory authority with that of the NLRB. *In re EEOC*, 709 F.2d 392, 396 (5th Cir. 1983); *Food Town Stores, Inc.* v. *EEOC*, 708 F.2d 920, 924 (4th Cir. 1983); *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338.

to issue a charge based upon an alleged pattern or practice of discrimination and it thereafter has significant power to investigate that charge. Like their counterpart charges under the National Labor Relations Act, commissioner's charges are not to be subjected to intense judicial review simply because they are a prelude to investigative scrutiny. Indeed, such charges should not even "be measured by the standards applicable to a pleading in a private lawsuit" because their "purpose is merely to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. at 307.

II

In view of the uniform precedent upholding generally worded charges under the original Act (see Pet. Br. 18-19 & n.12), respondent virtually concedes that, under Title VII as enacted in 1964, the charge in this case would be valid (Resp. Br. 32-33). Respondent argues, however, that the 1972 legislative history "suggests an intent to make the requirements for a Commissioner's charge more stringent than the previous 'reason to believe' standard" (*id.* at 15). This argument misinterprets both the prior "reasonable cause" standard for commissioners' charges and amended Section 706(b)'s oath and notice requirements.

A. Section 706(b), as originally enacted, imposed specific restrictions on the filing of a commissioner's charge. Unlike a charge filed by an aggrieved individual, a commissioner's charge could be filed only where the Commissioner had "reasonable cause to believe a violation of [Title VII] ha[d] occurred," and the charge "set[] forth the facts upon which it [was] based" (Pub. L. No. 88-352, 78 Stat. 259). In 1972, however, Congress deleted the "reasonable cause" and factual basis requirements and made commissioners' charges subject to precisely the same standards as those applicable to the complaints of aggrieved individuals—*i.e.*, the charges must be under oath and in the form required by the Commission. 42 U.S.C. 2000e-5(b). In keeping with the general purpose of the amendments to enhance the effectiveness of Title

VII enforcement, this change obviously was meant to relax, rather than add to, the pleading burden previously placed upon the Commission.

If, as respondent asserts, Congress intended amended Section 706(b) to impose heightened pleading requirements upon commissioners' charges, it would surely have said so—especially since in amending the section it was deleting language that had previously imposed higher standards on commissioners' than on lay charges. It is certainly not apparent how deletion of the requirements that a commissioner's charge be based upon "reasonable cause" and "set[] forth the facts upon which it [was] based" could increase rather than reduce any factual pleading burden (Pub. L. No. 88-352, 78 Stat. 259). It must be remembered, moreover, that a commissioner's charge merely commences an administrative investigation to determine whether there is reasonable cause to believe that the charge of discrimination is true. 42 U.S.C. 2000e-5(b). According to respondent, therefore, by deleting the "reasonable cause" requirement from Section 706(b), Congress actually imposed—without any discussion—a pleading requirement more stringent than reasonable cause, notwithstanding the fact that the purpose of the charge under Section 706(b) is merely to determine reasonable cause. The illogic of this contention is apparent. See *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1063 n.7 (rejecting conclusion of the court below that Section 706(b) imposes factual pleading requirements upon the Commission); *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 786 (same).

B. Although respondent eschews any intent to "impose 'technical pleading requirements'" upon the Commission or "unduly burden or impede" the Commission's processes (Resp. Br. 7), its hypertechnical construction of Section 706(b)'s oath and notice provisions (Resp. Br. 16-17)) belies that assertion.

1. The original Act provided that a charge by an aggrieved person must be "in writing under oath." Pub.

L. No. 88-352, 78 Stat. 259. Courts interpreting this requirement recognized that its purpose was "to protect employers from unfounded charges and harassment," but nevertheless uniformly held that " 'the provision is directory and technical rather than mandatory and substantive.' " *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969), quoting *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968). Accord, *Georgia Power Co.* v. *EEOC*, 412 F.2d 462, 466 (5th Cir. 1969); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d at 357. None of these cases held that the oath requirement mandated factual specificity in the charge. See, *e.g.*, *Georgia Power Co.* v. *EEOC*, 412 F.2d at 466 ("it would be out of keeping with the Act to import common law pleading niceties" to charge).

The 1972 legislative history demonstrates that Congress intended to make no changes in the oath provision other than to apply it to commissioners' charges.[8] Accordingly, every court that has interpreted the oath provision of the amended statute has applied the same principles developed before 1972. See, *e.g.*, *Price* v. *Southwestern Bell Telephone Co.*, 687 F.2d 74, 77-78 & n.3 (5th Cir. 1982); *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 18 (2d Cir. 1981); *Russell* v. *American Tobacco Co.*, 528 F.2d 357,

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[8] The Senate bill as reported from committee did not contain an oath requirement. See S. Rep. 92-415, *supra*, at 55; 1972 Leg. Hist. 464. During the floor debates, an amendment inserting the oath requirement was proposed by Senator Allen, who stated that "all this amendment would do would be to go back to the present law and make no change in the requirement" (118 Cong. Rec. 4815 (1972); 1972 Leg. Hist. 1672). The Senate eventually adopted the present language found in Section 706(b) (118 Cong. Rec. 4815 (1972); 1972 Leg. Hist. 1673-1674) and the House agreed in conference to the Senate language. Nothing in this course of events suggests that Congress intended to intensify the oath requirement in 1972. Indeed, the section-by-section analysis of the Senate bill which became Section 706(b) merely states that "[t]he present requirement that charges must be in writing and under oath or affirmation has been retained." 118 Cong. Rec. 4941 (1972); 1972 Leg. Hist. 1770.

364 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *EEOC* v. *Sears, Roebuck & Co.*, 504 F. Supp. 241, 257 (N.D. Ill. 1980); *EEOC* v. *Sears, Roebuck & Co.*, 22 Fair Empl. Prac. Cas. 457 (N.D. Ga. 1980).[9] Indeed, one court, after exhaustive analysis of the legislative history, rejected "[a]ny notion" that the oath requirement was intended to introduce a new limitation on Commission action, commenting that "[i]f anything, the sponsors of the oath amendments, as revealed in their comments, believed that the pre-1972 language directed the filing of Commissioners' charges under oath." *EEOC* v. *Sears, Roebuck & Co.*, 504 F. Supp. at 257 n.28.

As respondent suggests, the purpose of the oath requirement is to protect employers from unfounded charges. The protection inherent in the oath requirement, however, lies in the fact that the charge must be memorialized in a solemnly sworn document. An oath is a "form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully." *Black's Law Dictionary* 696 (5th ed. 1979). Its purpose is to impress the oath taker with a feeling of obligation to speak the truth. McCormick, *Law of Evidence* 582 (1972). An oath is not, as respondent appar-

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[9] The cases cited by respondent (Resp. Br. 17-18) are not to the contrary. The quotation from *EEOC* v. *Appalachian Power Co.*, 13 Fair Empl. Prac. Cas. 1294, 1295 (W.D. Va. 1976), aff'd, 568 F.2d 354 (4th Cir. 1978), to the effect that the 1972 amendments created a "heightened responsibility" is taken out of context. In that case, the commissioner's charge was unsworn, and the court therefore merely held that, unlike the 1964 Act which imposed no oath requirement upon a commissioner's charge, the 1972 amendments imposed this "heightened responsibility." *Stewart* v. *Core Laboratories, Inc.*, 460 F. Supp. 931 (N.D. Tex. 1978), also involved an unsworn charge, and involved a private rather than a commissioner's charge. *New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. 702 (E.D. La. 1974), involved a charge filed prior to the 1972 amendments and the Fifth Circuit resoundingly repudiated both the result and the rationale of the lower court's opinion (507 F.2d 160, 162-164 (1975)).

ently assumes (Resp. Br. 21), a statement of fact that, like an affidavit, can be tested for truth or falsity.[10] Therefore, the fact that commissioners' charges must be made under oath, in and of itself, satisfies the prophylactic purpose attached to the oath requirement by Congress.[11] See *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1064 ("The commissioner's good faith is presumed because of section 706(b)'s oath or affirmation requirement"); *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338 ("Employees have the assurance that any such estimates [of time periods] will be made in good faith because of § 706(b)'s requirement that charges be made under oath or affirma-

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[10] Respondent's argument that an oath must rest upon verifiable facts is premised solely on its equation of oaths with affidavits (Resp. Br. 21). The editors of *American Jurisprudence*, however, upon whom respondent primarily relies (Resp. Br. 21), specifically state that an oath "is distinguishable from an affidavit" (58 Am. Jur. 2d. *Oath and Affirmation* § 3 (1962)) because an oath "is a pledge" while an affidavit is a "statement of fact, which is sworn to as the truth" (*ibid.*). *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351 (D.C. Cir. 1949), also cited by respondent in its attempt to impose a factual verification requirement upon an oath, is inapposite. That case involved construction of an affidavit requirement in connection with a license application. The court assumed that a valid affidavit must be made under oath. The court, however, did not assume that the converse was true; *i.e.*, that an oath must meet the requirements of an affidavit. 175 F.2d at 354.

[11] Respondent urges that a statement of the factual basis for a charge is necessary "to determine whether the oath was taken in good faith" (Resp. Br. 22). The same reasoning, however, would have mandated a factual statement under Title VII as originally enacted, when Commissioner's charges had to be based on "reasonable cause." The courts, however, repeatedly rejected the argument that factual pleading was required as an additional check on the good faith of high government officials. *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 242; *Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799, 800 (6th Cir.), cert. denied, 400 U.S. 942 (1970).

tion"). Accord, *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787.[12]

2. Just as the oath requirement of Section 706(b) does not mandate that the Commission set forth the "factual basis" for a Title VII charge, the notice provisions of the statute similarly do not call for a prolix, detailed rendition of the "facts" underlying a discrimination charge. As explained in our opening brief (Pet. Br. 22-23), the "notice" provisions of Section 706(b) were drafted in 1972 to alter the Commission's then-prevailing practice of delaying the service of a charge upon a respondent until an EEOC officer was available to begin investigation into the charge. The notice provisions, therefore, were drafted "to accord respondents fair notice that charges are pending against them" (118 Cong. Rec. 4941 (1972)); they were not designed to impose onerous pleading burdens upon the Commission.[13]

III

A. Nor is there merit to respondent's claim that Commissioner Norton's charge does not provide "meaningful" notice of the "circumstances" of its alleged discriminatory

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[12] Unlike the above authority, none of the cases cited by respondent for the proposition that the Commission has "fil[ed] and pursu[ed] irresponsible charges" (Resp. Br. 22-23) involves a charge filed by a Commissioner of the EEOC. Respondent's implicit suggestion that EEOC commissioners are not to be trusted to exercise proper discretion in the performance of their duties is not a basis for thwarting enforcement of administrative subpoenas. See *NLRB* v. *Kingston Trap Rock Co.*, 222 F.2d 299, 302 (3d Cir. 1955) (court should not refuse to enforce an administrative subpoena simply "because of a self conjured groundless suspicion that there is 'danger' that a governmental employee will commit a wrongful act").

[13] Respondent's assertion (Resp. Br. 32) that there is a "critical link" between the oath requirement of Section 706(b) and its notice provisions is pure ipse dixit. Although a charge under Section 706(b) must be filed under oath, the content of the charge itself has expressly been left within the discretion of the Commission. 42 U.S.C. 2000e-5(b) (charges "shall contain such information and be in such form as the Commission requires").

activities (Resp. Br. 29).[14] The charge specifies that a Commissioner of the EEOC has reason to believe that the company has excluded blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions," and has confined women to office and clerical positions (Pet. App. 44a). The charge clearly notifies respondent of the substance of the allegations against it, and this recitation of the "circumstances" of respondent's conduct satisfies the requirements of Title VII as well as the dictionary. See *Webster's Third New International Dictionary*, 410 (unabridged 1976) (defining "circumstance" as "a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place"); *Black's Law Dictionary*, *supra*, at 220 (defining circumstances as the "[a]ttendant or accompanying facts, events or conditions").

What respondent actually seeks is not "notice" but the opportunity to "verif[y]" whether the Commission indeed has "authority to investigate" a particular claim (Resp. Br. 30). That is, respondent desires the opportunity to litigate whether the Commission has "facts" to support the allegations of its charge at the very outset of the administrative proceeding that is itself designed to determine whether or not there is reasonable cause to believe that those allegations are true. In short, respondent seeks to turn the Title VII enforcement scheme on its head by requiring evidence of reasonable cause in order to commence an investigation into whether such cause exists. Indeed, the two courts of appeals that have

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[14] Respondent concedes that it has received adequate notice of the "place" of the alleged discrimination, because the commissioner's charge in this case stated that the alleged violations occurred at the Wood River Refinery (Resp. Br. 9 n.9). In light of respondent's construction of the "date" and "circumstances" requirements of Section 706(b), however, we note that the charge did not specify in which offices, corridors, lunchrooms, lavatories and parking lots the alleged discriminatory acts took place.

considered the question since the decision below was rendered have strongly criticized and rejected any "factual basis" requirement for Title VII charges for precisely this reason. *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787; *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1063 n.7.

B. Respondent recognizes that, "because of its inherent nature" (Resp. Br. 25), a pattern or practice charge is "not susceptible of * * * precision with respect to dates" (*ibid.*). Therefore, a "good faith estimate" of the probable dates of the alleged violations is "the only practical way of meeting the date requirement." *Ibid.*, citing *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1064; *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338. As explained in our opening brief (Pet. Br. 27-29), July 2, 1965—the date utilized by Commissioner Norton in her amended charge—is a good faith estimate of the probable time period of respondent's allegedly discriminatory activities. See *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787.[15]

Respondent, however, argues that July 2, 1965, cannot be a "good faith estimate" of the probable time period of

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[15] In *A.E. Staley*, the Seventh Circuit held that July 2, 1965, was a "good faith estimate" of the time periods involved in a commissioner's charge. 711 F.2d at 786. In making that determination, the court relied, in part, on the district court's conclusion that the Commission did not have a policy of inserting the effective date of Title VII pro forma into all commissioners' charges. *Ibid.* As we noted in our opening brief (Pet. Br. 28-29), the Sixth Circuit's suggestion in *EEOC* v. *K-Mart Corp.*, *supra*, that the use of July 2, 1965, does not satisfy the date requirement of Section 706(b) was based upon a lower court finding that the Commission indeed "had a policy of inserting pro-forma the effective date of Title VII" into commissioners' charges (694 F.2d at 1063). Therefore, the only authority for the position that July 2, 1965, does not represent a "good faith estimate" of the probable time periods involved in a pattern or practice charge rests upon an erroneous finding regarding Commission practice. See Pet. Br. 28-29 (detailing Commission policy regarding use of the effective date of Title VII in commissioners' charges).

its misconduct because an audit conducted from 1973 to 1975 by the Department of the Interior Office of Equal Opportunity (the predecessor to the Office of Federal Contract Compliance Programs) found its Wood River Facility to be in compliance with Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14308 (1967), and Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969). Apart from the fact that respondent's "compliance" from 1973 to 1975 is subject to dispute,[16] this contention underscores once again that respondent's primary goal in this litigation is not to obtain "notice" of its alleged wrongdoing. Rather, respondent desires to litigate the merits of the averments in Commissioner Norton's charge. Respondent has been charged with discriminating against blacks and women

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[16] Records in the Commission's files indicate that the audit relied upon by respondents found numerous deficiencies, including underutilization of women and minorities, use of an improper labor area, and deficient equal employment opportunity policies. Pre-Review Analysis, Shell Oil Company, Wood River Refinery, January 22-26, 1973; Desk Audit Section, Follow-up Review of AAP at 2, 3, 7, 10 (received June 9, 1975); On-site Review, June 16-19, 1975, at 1, 9; Coding Sheet-Order 14, Shell Oil Company, Wood River Refinery, July 3, 1975. A conciliation agreement signed by Shell on June 19, 1975, noted "deficiencies" in respondent's employment practices, and stated that respondent would not be "in compliance" until they were corrected. Conciliation Agreement between Office for Equal Opportunity, U.S. Department of the Interior, and Shell Oil Company, Wood River, Illinois, dated June 19, 1975. Thus, far from contradicting the Commission's charge, the audit cited by respondent buttresses the case for investigating respondent's employment practices. (Copies of the 1973-1975 audit documents have been lodged with the Clerk of this Court.)

In any event, even if the audit had found no deficiencies, that fact alone would not suggest that Commission inquiry would be inappropriate. The standards of Exec. Order No. 11,246, under which the 1973-1975 audit was conducted, differ from those of Title VII and therefore do not control the question of compliance with Title VII. See *Swint* v. *Pullman Standard*, 539 F.2d 77, 95 n.44 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975).

since at least 1965, but, rather than submit to an administrative investigation to determine whether there is any basis for that charge, respondent challenges the Commission to overcome respondent's "proof" (in the form of the 1973 audit) that it could not be guilty of the alleged discrimination. The Commission has made an allegation, the respondent has countered with a contrary allegation, and it now argues that the Commission may not proceed without first bringing forth evidence to support the original allegation. Although as set forth in note 16, *supra*, the government does have grounds upon which to rebut respondent's asserted "compliance" with federal equal employment opportunity law during the period 1973-1975, the Commission should not be forced to present such proof in order to have its investigatory subpoena enforced. A subpoena enforcement proceeding should not become—as this one undoubtedly has—a mini-trial on the merits of an administrative charge. See, *e.g.*, *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d at 36.[17]

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[17] Contrary to respondent's further contentions (Resp. Br. 25), the date July 2, 1965, certainly informs an employer what records might be relevant during the administrative investigation. See 29 C.F.R. 1602.14 (requiring employer to maintain any existing employment records relevant to a charge; prior to issuance of a charge employer need only maintain records for six months). A more "specific" date, moreover, would not greatly aid a district court in determining "relevancy" during a subpoena enforcement action. As we have previously detailed (Pet. Br. 30-31), the date alleged in a charge does not restrict the temporal scope of a Commission investigation. See *Local 104, Sheet Metal Workers*, 439 F.2d at 243 (information regarding pre-Act practices is relevant to Commission inquiry). Therefore, even if the court were given a more "precise" date than July 2, 1965, information prior to that date could still be relevant to a Commission investigation and therefore properly be subject to an administrative subpoena. See *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1304 (10th Cir. 1974); *Georgia Power Co.* v. *EEOC*, 412 F.2d at 468. See also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 309 n.15 (1977).

The Equal Employment Advisory Council's ("EEAC") argument, raised here for the first time, that the charge is deficient because

IV

In the final analysis, the record in this case is the strongest argument against the interpretation of Section 706(b) espoused by respondent. The Commission's investigation of respondent's employment practices has been stalled for more than three years[18] because of respondent's objections to the sufficiency of Commissioner Norton's charge. Moreover, the record—and respondent's brief—leave little doubt that "notice" is hardly respondent's primary concern.[19] Rather, respondent seeks "objective, verifiable information" showing the "source of [the Commission's] belief" that discrimination occurred so that a federal court can determine whether "the belief is well-founded" (Resp. Br. 22, 27, 30). Respondent, in sum, seeks to transform Commission subpoena enforcement cases into contests on the merits of the underlying charges of discrimination.

Respondent's construction of Section 706(b) thus is contrary to well-established principles governing the conduct of subpoena enforcement actions (see Pet. Br. 32-

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it does not "demonstrate" that the violation continued to within 180 days of the date of filing (EEAC Br. 16) is nothing more than a claim that the EEOC must prove its case before it investigates its charge. One of the purposes of the Commission's investigation is to determine whether the charge is timely; the Commission need not prove timeliness as a pre-condition to its investigation. *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir. 1977); *Pacific Maritime Association* v. *Quinn*, 491 F.2d 1294, 1296 (9th Cir. 1974). After reviewing all relevant evidence, the Commission may determine that the discrimination did not continue to within 180 days of the filing date and dismiss the charge as untimely. See § 706(e), 42 U.S.C. 2000e-5(e); 29 C.F.R. 1601.19(a).

[18] Respondent's action to quash the Commission's investigatory subpoena was filed on September 18, 1980 (J.A. 6).

[19] The record demonstrates that respondent was well aware that the charge was based on a statistical profile, and that its own EEO-1 reports supplied the raw data for that profile. See J.A. 92, 157.

35).[20] The general rule that administrative subpoenas should be enforced by the federal courts "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" applies with full force to the Title VII administrative scheme. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).[21] Here, as in other administrative investigations, "[j]udicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *FTC* v. *Standard Oil Co.*,

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[20] As we have noted, the Commission's investigatory authority was modeled on the National Labor Relations Act which, like Title VII, requires the filing of a charge prior to administrative inquiry. Under that Act, the courts have uniformly rejected arguments that courts must consider the merits or the factual basis for an administrative charge prior to enforcing an administrative investigatory subpoena. See, *e.g.*, *NLRB* v. *Dutch Boy, Inc., Glow Lite Division*, 606 F.2d 929, 933 (10th Cir. 1979); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 111-112 (3d Cir. 1979); *NLRB* v. *Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir 1975); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 26 (7th Cir.), cert. denied, 326 U.S. 731 (1945); *Cudahy Packing Co.* v. *NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

[21] And see, *e.g.*, *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1065-1066; *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981); *NLRB* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 (9th Cir. 1981); *NLRB* v. *Dutch Boy, Inc., Glow Lite Division*, 606 F.2d 929, 933 (10th Cir. 1979); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 111 (3d Cir. 1979); *NLRB* v. *Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975); *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d 160, 165 (5th Cir. 1975); *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 242; *Link* v. *NLRB*, 330 F.2d 437, 440 (4th Cir. 1964); *NLRB* v. *Kingston Trap Rock Co.*, 222 F.2d 299, 301 (3d Cir. 1955).

449 U.S. 232, 243 (1980) ("Socal").[22] If respondent's contentions were accepted by this Court, Commission investigations would inevitably degenerate into protracted district court litigation focusing upon whether the Commission has shown, at the very outset of its investigation, that particular respondents have indeed violated Title VII. See, *e.g.*, Resp. Br. 40 n.37; National Association of Manufacturer's Br. 5; Chamber of Commerce Br. 14.[23]

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[22] Respondent's argument (Resp. Br. 8, 38) that the general principles enunciated by this Court in *FTC* v. *Standard Oil Co.*, *supra*, do not apply to this case does not withstand scrutiny. Contrary to respondent's implication, the government did not cite *Socal* for the proposition that the Commission could investigate without first issuing an administrative charge (see Resp. Br. 36-37). Nor did *Socal* involve the scope of the FTC's investigatory powers (*ibid.*). Rather, in *Socal* the issue was whether a court could scrutinize the factual basis for an administrative complaint which, according to the respondent, had been improperly issued. The Court concluded that the issuance of an administrative complaint is not subject to judicial review because it is merely a threshold determination and review at that early stage would interfere with "the proper functioning of the agency" and result in inefficient and perhaps unnecessary piecemeal review. 449 U.S. at 241-242. As in *Socal*, the Commissioner's charge in this case merely triggers an investigation that has no determinate consequences for respondent (see Pet. Br. 43). Therefore, the holding in *Socal* that judicial review of preliminary administrative determinations "should not be a means of turning prosecutor into defendant" (449 U.S. at 243) applies with equal force to judicial enforcement of the EEOC's investigatory subpoenas.

[23] The argument of amicus Chamber of Commerce, based on *Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978), that the Commission's investigatory subpoena violates the Fourth Amendment (Chamber of Commerce Br. 11-15) is not before this Court. Shell unsuccessfully raised the constitutional argument below (Pet. App. 13a), did not file a petition for a writ of certiorari on the issue, and has not urged this ground as an alternative basis for affirmance.

In any event, the Chamber's argument is without merit. In the context of administrative subpoenas of corporate records, the Fourth Amendment requires only that the demand be for a purpose

Such a result should not be countenanced. As the Fourth Circuit recognized long ago, "judicial hearings into the merits of the charging party's allegations * * * frustrate congressional intent by entailing extensive delay in the disposition of Title VII cases." *Graniteville Co. (Sibley Division)* v *EEOC*, 438 F.2d at 36. Such delay is especially unwarranted in the context of Title VII because "[i]n an EEOC case, time is not just money. It is the welfare of those very citizens whom Congress directed the Commission to protect." *In re EEOC*, 709 F.2d at 398.[24]

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lawfully authorized by Congress and that the documents sought be relevant to the inquiry and not unduly burdensome to produce. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 209. Accord, *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *United States* v. *Morton Salt Co.*, 338 U.S. at 652. The district court here determined that the subpoena sought relevant information and that compliance would not be unduly burdensome (Pet. App. 29a-30a). The court of appeals affirmed (Pet. App. 13a).

[24] Respondent submits that the Court should at least require the Commission to identify the relevant labor market and job categories used for statistical comparison in all future commissioners' charges (Resp. Br. 41 n.38). But, any such requirement would inevitably cause employers to attempt to rebut the Commission's comparative data, as respondent has attempted to do in this case. Prior to administrative investigation of the charge, moreover, the Commission is in no position to litigate such issues as "relevant" labor markets and "appropriate" job categories. Nor would requiring specification of the factual basis of a charge facilitate early settlement, as respondent suggests (Resp. Br. 42); the Commission can hardly be expected to settle a systemic charge prior to obtaining information regarding the allegations of that charge.

For the reasons set forth above and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States ("Chamber") is the largest association of business and professional organizations in the nation. Its current membership exceeds 213,000 members, including 209,000 cor-

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[1] This brief is being filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The parties' letters of consent are being filed with the brief.

porations, partnerships, proprietorships, and individuals, as well as 2,600 state and local Chambers of Commerce, and 1,200 trade and professional associations. The Chamber regularly represents its members' interests in litigation raising a broad cross section of issues, including Title VII issues.[2]

The issues in this case are of particular interest to our members as they deal with the parameters of a government agency's investigative powers. The Equal Employment Opportunity Commission ("EEOC" or "Commission"), unlike many government agencies, lacks plenary authority to conduct investigations. Quite the contrary, the EEOC is authorized to launch an investigation only after the respondent has been served with notice of a valid charge of discrimination.

The Commission itself may file a charge only to protect an alleged discriminatee who wishes to remain anonymous, or when it has other information on which to base a sworn belief that an employer has violated Title VII of the Civil Rights Act of 1964. The Chamber believes that the charge which precipitated this litigation was an abuse of the agency's authority. Moreover, the Chamber believes that the Commission has utilized substantially identical charges to investigate numerous other employers. *See e.g., St. Regis Paper Company—Kraft Division* v. *EEOC, appeal docketed,* No. 83-3558 (9th Cir. 1982); *EEOC* v. *K-Mart Corp.,* 694 F.2d 1055 (6th Cir. 1982); *EEOC* v. *Neches Butane Products Company,* 31 FEP 1099 (5th Cir. 1983); *EEOC* v. *C.A. Norgren Company,* 535 F.Supp. 491 (D. Colo. 1982), *appeal docketed,* No. 82-

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[2] *E.g., Newport News* v. *EEOC* —— U.S. ——, 51 U.S.L.W. 4837 (June 20, 1983); *EEOC* v. *K-Mart,* 694 F.2d 1055 (6th Cir. 1982); *U.S. Postal Service Board of Governors* v. *Aikens,* —— U.S. ——, 75 L.Ed.2d 403 (1983).

1578 (10th Cir. 1982); *Stater Bros. Market* v. *EEOC*, *appeal docketed*, No. 82-5507 (9th Cir. 1982).

This practice of the Commission has affected many members of the business community and has the potential to affect a much larger number, since every employer of 15 or more persons is covered under Title VII. It is for these reasons that the Chamber files this *amicus* brief.

SUMMARY OF ARGUMENT[3]

A fundamental requirement when filing any Title VII charge is to provide notice setting forth the specific time of the alleged discrimination and the actual basis for the charge to the employer. The charge lodged against Shell Oil Company ("Shell" or the "Company") fails to satisfy this requirement; thus, it is jurisdictionally deficient.

Faced with a deficient charge, the EEOC is unauthorized to conduct an investigation and any subpoena issued pursuant thereto is likewise invalid.

Moreover, the EEOC's subpoena fails to satisfy the Fourth Amendment test of reasonableness in three critical respects: (1) it lacks the mandatory statutory prerequisites of specific dates and circumstances; (2) it is unduly burdensome in its indefiniteness and overbreadth; and (3) it fails to show a reasonable basis for the inspection.

Finally, the commissioner's charge is an inefficient means for remedying patterns and practices of employment discrimination. The program is unsuccessful in furthering the agency's goal of ensuring equal employment opportunities and constitutes an inefficient use of government resources.

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[3] In the interest of brevity the Chamber will not restate the facts of this case. Rather, the Chamber incorporates by reference the facts as stated by Respondent Shell Oil Company.

ARGUMENT

I. A BOILERPLATE CHARGE OF DISCRIMINATION FAILS TO PROVIDE RESPONDENTS SUFFICIENT NOTICE IN ACCORD WITH SECTION 706(B) OF TITLE VII.

A. The Statutory Mandate is Clear and Unambiguous: Title VII Requires That Every Notice of Charge Must Contain a Statement of the Date, Place and Circumstances of the Alleged Unlawful Employment Practices.

Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(b) ("Title VII" or the "Act"), sets forth in clear and straightforward language the mandatory precedents to a valid charge of discrimination.

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a *notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer* . . . within ten days, and shall make an investigation thereof. Charges shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires. [emphasis added].

As originally enacted in 1964, section 706(a)—the predecessor to section 706(b)—of Title VII provided:

> Whenever . . . a written charge has been filed by a member of the Commission where he has *reasonable cause* to believe a violation of this title has occurred (and such *charge sets forth the facts* upon which it is based) . . . the Commission shall furnish [the charged party] with a copy of such charge.

42 U.S.C. § 2000e-5(a) (1970) [emphasis added].

Two requirements were manifest under subsection (a). First, before a commissioner's charge could be issued, a commissioner was required to have "reasonable cause" to believe that Title VII had been violated. Second, the facts upon which the charge was based had to be set forth therein.

The framers of Title VII left little doubt as to the meaning of this language. The legislative history of the 1964 Act shows that Congress intended section 706(a) to be a substantial restraint upon EEOC's authority to issue commissioner's charges.

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a *specific charge* has been filed in writing. In this respect, *the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission. 15 U.S.C. 43, 46, or of the Wage and Hour Administrator, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing.*

Interpretative Memorandum of Title VII of Senators Case and Clark, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.), at 3054 [emphasis added].[4]

In explaining the requirement during floor debate, Representative Goodell of New York stated:

> Mr. Chairman, I think the chairman will agree with me that this is a section that is to protect us from errant and arrogant bureaucracy—from an adminis-

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[4] Senators Case and Clark were the floor managers for H.R. 7152, the version of Title VII initially approved by the House. Although changes were made in the Senate, those changes did not alter the provisions discussed above. The Case-Clark memorandum was the sole Congressional report concerning the investigatory powers of the EEOC, and aside from the Act itself, the preeminent expression of legislative intent with respect to those powers.

> trator running wild without any reasonable cause . . . . We very carefully provided that there had to be reasonable cause to believe that there had been a violation before any administrator moved into the situation.

Legislative History, Titles VII and XI of the Civil Rights Act of 1964, *supra*, at 3313 [emphasis added]. Similarly, the Chairman of the House Judiciary Committee, Representative Celler of New York, stated:

> In other words, we want to be sure that before the member of the Commission acts he has *reasonable cause to believe* a violation of the act occurred. *We want unequivocally to nail down that condition precedent* and, therefore, we provide for this additional language.

Id. [emphasis added]. From its enactment, then, Title VII proscribed the issuance of commissioner's charges except when the commissioner possesed sufficient facts to support a reasonable belief that violations of the Act had occurred.

In 1972, Congress amended section 706 to its present form. The revised requirements for the issuance of commissioner's charges made two primary changes in the law, both of which placed significant new burdens on the EEOC. *See*, p. 4 *supra*. First, whereas former section 706(a) required only that a commissioner have "reasonable cause" for issuing a charge, amended section 706(b) directs that all charges, including commissioners' charges, must be under oath or affirmation. Second, while former section 706(a) required only that charges set forth "the facts" on which they were based, amended section 706(b) provides that specific notice of the "date, place and circumstances" of the alleged acts of discrimination must be given to the respondent.[5]

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[5] Section 706(b) also provides that the charge "shall contain such information and be in such form as the Commission requires." Thus, it is important to stress that the EEOC's own regulations require a

Moreover, by amending section 706 in 1972 to require an EEOC commissioner to file a charge under oath, Congress intended that a commissioner should exercise heightened responsibility in the charging process above and beyond that responsibility which had been required under section 706(a) of the 1964 legislation. The United States Court of Appeals for the Fourth Circuit adopted the following district court explanation of the effect of the 1972 amendment:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission . . . . [T]hat is the clear import of the language Congress placed in the Act of 1972.

EEOC v. *Appalachian Power Co.*, 13 FEP 1294, 1295 (W.D. Va. 1976), *aff'd for reasons set forth by District Court*, 568 F.2d 354 (4th Cir. 1978). Another court has concluded:

> [T]he 1972 amendment requires the Commission to file charges "upon an oath or affirmation," rather than upon the less onerous requirements of "reasonable cause."

Stewart v. *Core Laboratories, Inc.*, 460 F.Supp. 931, 933 (N.D. Tex. 1978). *See also EEOC* v. *C.A. Norgren*, 535 F.Supp. 491, 494 (D.Colo. 1982), *appeal docketed*, No. 82-1578 (10th Cir. May 11, 1982); *New Orleans Public Service, Inc.* v. *Brown*, 369 F.Supp. 702, 707-08, *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).[6]

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written, verified charge that includes a "clear and concise statement of the facts, incluring pertinent dates[.]" 29 C.F.R. § 1601.12 (a)(3); *see also* 29 C.F.R. § 1601.9.

[6] While deciding this case under the pre-1972 standard, the Fifth Circuit recognized the more restrictive post-72 standard. Equally important, we note that the charge under review contained substantial statistical information, unlike the charge lodged against Shell Oil.

Thus, having plainly heightened EEOC's responsibility in the filing of commissioner's charges, Congress instructed the EEOC to pursue an investigation based on such a charge only if it can articulate some specific time and factual basis for filing the charge. The charge lodged against Shell Oil is devoid of any information that would satisfy this requirement. *See, Shell Oil Co.* v. *EEOC*, 676 F.2d 322, 323-4 (8th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1181 (1983). Rather, it consists entirely of boilerplate language; it alleges that the Company has violated the Act since July 2, 1965, its effective date, and it alleges discrimination only in the broadest generic terms without reference to any specific practices or acts. *Id.*

The Chamber respectfully submits that the Court of Appeals for the Eighth Circuit correctly construed the Act to require that the EEOC "inform the employer of the approximate dates of the unlawful practices", and "to the extent possible, the Commission should include in the charge the factual basis for the Commissioner's belief that a Title VII violation has occurred (footnote omitted)." *Id.* at 325 and 326.[7] To construe the Act otherwise, is to eliminate the term "circumstances."

We stress that the Eighth Circuit did not retreat from its position in its more recent decision in *EEOC* v. *Michael Construction Co.*, 31 FEP 1081 (1983). That case was brought by an individual, and the panel correctly recognized the desirability of construing individual charges in a liberal manner to effect the purposes of the

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[7] The Chamber is aware that a majority of a Seventh Circuit panel has recently disagreed with the Eighth Circuit. *EEOC* v. *A. E. Staley Mfg. Co.*, No. 82-1655 (7th Cir. July 1, 1983). The Chamber believes that the dissent in that case correctly states that the majority decision fails to give proper consideration to the language of section 706(b). Slip op. at 17.

Act. *Id.* at 1083. The panel also expressly found that the individual had—

> unequivocally charged that the company discharged him and gave false information to the employment office after his discharge. Thus, the charge *specifically* [described] the *actions* "complained of" and was legally sufficient, even under a conservative construction standard. (footnote omitted)

Id. at 1083-4 (emphasis in original).

The panel expressly distinguished *Shell*:

> This reading of the "circumstances" language is not inconsistent with our holding in Shell Oil Co. v. United States EEOC, 676 F.2d 322, 29 FEP Cases 1519 (8th Cir. 1982), cert. granted, 103 S.Ct. 1181 (1983). In Shell Oil, a panel of this Court found the charge and notice in a Title VII case initiated by the Commissioner insufficient to support an action to enforce an EEOC investigatory subpoena. The charge and notice in that case, however, cited no specific actions by the employer which were allegedly motivated by racial animus nor any statistics indicating disparate impact. Without "some factual or statistical basis" underlying the EEOC's general allegation of "discrimination in all areas of employment practice," the panel held that the notice was insufficient. Id. at 326. In the instant case, the notice of Jackson's charge alleged specific facts of his discharge and of false statements made by the company to the unemployment office. These allegations supply the "factual" basis missing in Shell Oil.

Id., n. 4.

The Eighth Circuit's position then gives due deference to the legitimate concerns of the EEOC and respondents. It fulfills the Act's remedial purposes, while avoiding unauthorized audits or "fishing expeditions". *Shell Oil* v.

EEOC, 676 F.2d at 326. The Eighth Circuit's decision should be affirmed.

B. If a Charge is Filed which is Found to be Defective, the EEOC is not Authorized to Conduct an Investigation or to Enforce its Administrative Subpoena.

The courts have repeatedly recognized that a charge of discrimination, which is in some way jurisdictionally deficient, although ostensibly filed in accordance with the statutory and regulatory requirements, will not support the initiation or continuation of an investigation by the EEOC. In such circumstances the EEOC is without authority to proceed with an investigation grounded upon a deficient charge of discrimination, and a court is without jurisdiction to enforce a subpoena issued persuant thereto. *EEOC* v. *Dean Witter & Company*, 643 F.2d 1334, 1337 (9th Cir. 1980); *EEOC* v. *Sears, Roebuck & Company*, 490 F.Supp. 1245 (M.D. Ala. 1980); *Stewart* v. *Core Laboratories, Inc.*, 460 F.Supp. at 936 (N.D. Tex. 1978); *New Orleans Public Service, Inc.* v. *Brown*, 369 F.Supp. 713 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).

As articulated by the court in *EEOC* v. *Appalachian Power Co.*:

> The charge in this case is simply not a valid charge, thus the EEOC had no jurisdiction to proceed with its investigation, and this court has no jurisdiction to hear this case. If there is no valid charge then the investigation and conciliatory procedures cannot be triggered because there is no jurisdictional board from which the EEOC might spring to those procedures.

13 FEP 1294, 1295-96 (W.D.Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978).

II. THE EEOC MAY NOT DEPRIVE RESPONDENTS OF THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

Subpoenas issued by administrative agencies are subject to the reasonableness requirements of the Fourth Amendment. *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). The determination of whether such administrative searches satisfy the Fourth Amendment involves three equally essential inquiries: whether the proposed search is authorized by statute, whether it is properly limited in scope, and whether the agency properly initiated the particular search. *United States* v. *Mississippi Power & Light Co.*, 638 F.2d 899, 907-08 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 387 (1981), *citing*, *Marshall* v. *Barlow's Inc.*, 436 U.S. at 320-21, 323.

The EEOC's subpoena fails to satisfy the Fourth Amendment test of reasonableness in all three respects: the investigation is not authorized under Title VII, the subpoena is unduly burdensome, and the manner in which it was initiated was unreasonable.

A. EEOC's Investigation is Unauthorized.

As already discussed at great length, EEOC's proposed search lacks statutory authorization because it lacks the mandatory statutory prerequisites of specific dates and circumstances. The EEOC has no general audit or plenary investigative authority; it may proceed only when specific written charges under oath have been filed in compliance with Title VII and Commission regulations. *See, supra*, pp. 4 to 10. Since the charge in this case fails in this respect, EEOC's attempt to use the commissioner's charge-filing process to target Shell's facilities for a span of years and for unspecified events constitutes nothing more than a general search which is prohibited under the Fourth Amendment.

B. The Proposed Search Is Unduly Burdensome.

The EEOC's investigation also fails to satisfy the second prong of the *Mississippi Power & Light* test, *i.e.*, it is not properly limited in scope. In *Marshall* v. *Barlow's*, *supra*, the Supreme Court specified that:

> Delineating the scope of a search is particularly important where documents are involved.

Id. at 324, n.22.

Even prior to *Barlow's*, the courts had long demonstrated concern for over-reaching on the part of agencies in otherwise valid investigations. The Fourth Amendment "guards against abuse only by way of too much *indefiniteness* or *breadth* in the things required to be 'particularly described', if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1945);[8] *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (Investigations "may be objected to on grounds of oppressiveness and as requiring an unreasonably burdensome compliance"); *New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. at 707 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975) ("The EEOC's liberal investigative powers must not be confused with the periodically pursued, but nonexistent, right to ramble

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[8] *Oklahoma Press* is particularly instructive because it reflects the Supreme Court's thinking on the standards to be applied in the context of a court order for enforcement of a subpoena *duces tecum*. While the Court upheld the order of enforcement in *Oklahoma Press*, it noted pointedly that no "objection [had] been taken to the breadth of the subpoena or to any other defect which would invalidate them" 327 U.S. at 195 (footnote omitted).

See also, See v. *City of Seattle*, 387 U.S. at 544 ("it is now well settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

through a company's records purely in hope of discovering statutory violations").

In this case, the EEOC has issued a subpoena that is wide-ranging. It includes a large number of requests with numerous sub-parts, some of which are vague and generally incomprehensible. It includes requests for data that is proprietary and/or privileged in nature, and for data that would require the use of numerous hours of Shell's material and personnel resources.

The laundry lists of information illustrates that the subpoena issued in this case extends past the realm of reasonableness and is "of such a sweeping nature and so unrelated to [any] matter properly under inquiry as to exceed the [EEOC's] investigatory power." (citation omitted) *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1949). It therefore fails the second prong of the *Mississippi Power & Light* test.

C. EEOC's Method of Initiating the Investigation was Unreasonable.

A statutorily authorized search can only be found upon either (1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative standards for conducting the search are satisfied with regard to the particular establishment; or (3) a showing that the search has been undertaken pursuant to an administrative plan containing specific neutral criteria. *United States* v. *Mississippi Power & Light Co.*, 638 F.2d at 907 (5th Cir. 1981). The EEOC has failed to point to any specific evidence of an existing Title VII violation, in order to justify its charge and investigation of Shell.

Further, the EEOC has failed to show that its decision to investigate Shell is based either on reasonable standards for inspection or on an administrative plan containing specific neutral criteria. The record demonstrates that

Shell's employment practices provided no basis for instigating an investigation against the company.

(a) Within the five years prior to the filing of the commissioner's charge, no charges of employment discrimination on the basis of race or sex had been filed against Shell's Wood River, Illinois refinery.

(b) Within the ten years prior to the commissioner's charge, only two charges of race or sex discrimination had been filed with either the Illinois Fair Employment Practices Commission or the EEOC. Both charges were dismissed.[9]

(c) As of December 31, 1979, the Wood River Refinery employed 1,757 persons, of whom 126 were black and 131 were female. Thus, as of that date, blacks and females constituted 7.2% and 7.5%, respectively, of the total work force at the Wood River Refinery.

(d) As of December 31, 1979, blacks and females constituted respectively 4.7% and 8.0% of the appropriate labor market for the Wood River Refinery.[10]

(e) Of the employees at the Wood River Refinery on December 31, 1979, who had been hired by Shell

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[9] Over the years 1973-1975, the Department of Interior/Office of Equal Opportunity, the predecessor of the Office of Federal Contract Compliance Programs, conducted a compliance review of Shell's Wood River facility. The review included a desk audit and an on-site investigation. Upon completion of the compliance review, the agency found Shell to be in compliance with Executive Order 11246, which is similar in purpose to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and which contains not only an anti-discrimination clause, but also an affirmative action obligation.

[10] During the compliance review mentioned in Footnote 9, *supra*, Shell and the reviewing agency reached agreement on the appropriate method for determining "availability" and the appropriate "local labor market" for the Wood River facility. Shell's data in item (c) through (f) were based on this agreed-upon method.

since July 2, 1965 (the effective date of Title VII), 12.3% were black and 9.8% were female.

(f) For the period beginning more than two years before the filing of the commissioner's charge, the hiring rate for blacks and females at the Wood River Refinery significantly exceeded their respective availabilities in the Wood River Refinery labor market. During this same period, promotions of blacks and females at the Wood River Refinery exceeded both the internal work force representation and the external Wood River Refinery labor market availability figures.

(g) The increases in black and female representation in the Wood River Refinery work force occurred despite the fact that the total number of employees at the Refinery declined by 23% over the ten years ending December 31, 1979.

Lacking objective criteria, the EEOC had no reasonable basis on which to launch its extensive investigation. The subpoena does not withstand scrutiny under the third prong of the *Mississippi Power & Light* test.

III. THE USE OF THE COMMISSIONER'S CHARGE IS AN INEFFICIENT MECHANISM FOR REMEDYING SYSTEMIC EMPLOYMENT DISCRIMINATION.

In addition to all of the foregoing, there are compelling reasons why the EEOC should not be permitted to proceed with its investigation of Shell Oil. First, this investigation, and others in which the Commission seeks to use the commissioner's charge as an auditing tool, simply does not further the agency's primary purpose, to ensure equal employment opportunities. The Commission's investigation of Shell provides a graphic example. As explained above, Shell's Wood River Refinery was audited and found to be in compliance with E.O. 11246 during the years 1973-1975. As recently as December 31, 1979,

blacks and females were employed at the Company at a rate that compared favorably to their availability in the labor market; within the two years preceding the filing of the charge blacks and females were hired and promoted at rates which exceeded their availability; within the five years preceding the filing of the charge, no individual charges had been filed against the Company. Against this backdrop, it is inconceivable why a commissioner's charge lodged against Shell would be considered consistent with the agency's responsibility.

Secondly, considering the competing demands on the EEOC's limited budget, the commissioner's charge as an auditing tool represents an inefficient use of its resources. One of the major problems facing the EEOC in past years has been its overwhelming backlog of cases. According to the testimony of its Chairman, Clarence Thomas, the backlog of charges at the agency was 45,000 as of June 15, 1982. *Examination of Certain Financial Management Practices Within the Equal Employment Opportunity Commission. Hearing Before the Committee on Labor and Human Resources. United States Senate*, 97th Cong., 2d Sess. 29 (1982). Fifty-two percent of those charges were between one and six years old. *Id.* at 34. In view of this tremendous backlog of charges filed by "real" people alleging that they have been subjected to unlawful employment practices, it appears illogical that the agency continues to pursue its own agenda of auditing companies, such as Shell. If the funds and personnel allocated to such charges were redirected to solving many of the backlogged cases, the Commission, as a whole, would function more efficiently in achieving its overall goals.

We hasten to add that the individual charge could serve as an effective tool for eliminating systemic discrimination. As the EEOC itself points out, enforcement actions under Title VII are not limited by the charge. *See*, Peti-

tion for Writ of Certiorari, p. 15. Rather, "[a]ny violations that the EEOC ascertains in the course of a reasonable cause investigation of the charging party's complaint are actionable." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). We submit that agency efforts limited to investigating charges filed by or on behalf of "real" victims, is more closely attuned to its goal of addressing problems of systemic discrimination.

Moreover, other remedial measures are available. For instance, class actions may be brought by private attorneys on behalf of alleged discriminatees, who may then collect reasonable attorneys' fees for their efforts. *See, Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

Third, the EEOC's commissioner's charge is a waste of government resources because it duplicates the OFCCP's Executive Order 11246 program. As stated in an April 9, 1981 report of the General Accounting Office:

> Given the changes OFCCP made to the contract compliance program and EEOC's issuance of affirmative action guidelines, the potential overlap between the two agencies has increased. Both agencies have essentially the same concerns in their enforcement activities and consider the same issues in their employer reviews.

GAO Report to the Congress, "Further Improvements Needed in EEOC Enforcement Activities" (April 9, 1981) p. 38.

Vital resources could be salvaged and used more advantageously if such investigations were confined to the OFCCP. As stated in the same GAO report:

> EEOC depends heavily on information OFCCP has on employers' personnel systems and practices to supplement its own data in preparing systemic charges.

> EEOC also continues to investigate employers as potential targets for its systemic program . . . even though OFCCP may have recently completed an investigation, planned to make one, or was conducting an investigation of the same employer.

Id. at 34. This is precisely what occurred with respect to Shell. As we discussed in footnote 9, *supra*, Shell was investigated by OFCCP's predecessors and found to be in compliance with the executive order. Nevertheless, EEOC felt that an additional audit was necessary.

Such duplication of government resources is nonsensical. The funds used to gather already gathered information or to transfer information from one agency to another could be used to improve the EEOC's troubled financial status, *GAO Report to the Chairman, Committee on Labor and Human Resources,* ("Financial Management Problems at the EEOC", October 30, 1981), and to investigate and conciliate many of the existing outstanding cases. It is especially important to emphasize that this auditing function, which we maintain is *ultra vires* for the EEOC, will not go undone. The OFCCP will continue to carry out this function. The only difference is that it will no longer be carried out twice.

Finally, such repeated investigations place a heavy burden on the employer, who may find himself forced to respond to an unlimited number of EEOC and OFCCP investigations. As stated by Senator Don Nickles in the June 15, 1982 Oversight Hearing, "there is no need for duplicating our resources or to place employers in a double bind." *Examination of Certain Financial Management Practices Within the Equal Employment Opportunity Commission, supra* at 34.

For all of these reasons, the use of commissioners' charges to conduct audits is unnecessary, unfair to the companies involved and a waste of agency resources.

CONCLUSION

For all of the reasons discussed in this brief, Amicus Chamber of Commerce urges the Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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No. 82-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties[1] in support of Respondent Shell Oil Company ("Shell").

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

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[1] Their consents have been filed with the Clerk of the Court.

requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the court's consideration in the instant case—*i.e.*, the appropriate standards for the issuance of a valid EEOC Commissioner's charge.

Because of its interest in such issues, EEAC has been permitted to participate in numerous other cases in this Court involving substantive and procedural issues under Title VII. *See, e.g., Ford Motor Co. v. EEOC*, 102 S. Ct. 3057 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In addition, EEAC filed an amicus curiae brief on the issues presented in this case in the Sixth Circuit in *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982).

STATEMENT OF THE CASE

On September 27, 1979, then Commissioner Norton issued a Commissioner's charge against Shell alleging that the company had violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating against

women and blacks at its Wood River, Illinois refinery.[2] The charge alleged discrimination in recruitment, hiring, selection, job assignment, training, testing, promotion and other terms and conditions of employment. The charge did not include the dates of the alleged violations nor did it set forth any specific facts underlying the charge.

After unsuccessful attempts by Shell to obtain from the Commission additional information surrounding the charge, the Commission issued an administrative subpoena on May 15, 1980 seeking extensive information regarding Shell's employment practices. After unsuccessfully petitioning the Commission for modification of its subpoena, Shell filed suit in the Eastern District of Missouri seeking a declaratory judgment that the Commissioner's charge failed to comply with the requirements of Section 706(b) of Title VII, as amended, 42 U.S.C. § 2000e-5(b).[3]

Commissioner Norton amended the charge on January 16, 1981 to state that she had "reason to believe" that Shell had engaged in the unlawful practices "on a continuing basis from at least July 2, 1965."[4] Thereafter, EEOC filed suit in the Southern District of Illinois to enforce its administrative subpoena. Following the trans-

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[2] The charge is set forth in full in the Appendix to the Commission's petition for a writ of certiorari ("Pet. App.") at 44a.

[3] Section 706(b) reads in relevant part as follows:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (*including the date, place and circumstances of the alleged unlawful employment practice*) on such employer . . . within ten days and shall make an investigation thereof. Charges shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires (emphasis added).

[4] The amended charge is set forth in Pet. App. at 47a.

fer of the Commission's suit to the Eastern District of Missouri and its consolidation with Shell's action, the district court, in an opinion reported at 523 F. Supp. 79, enforced the Commission's subpoena.

The Eighth Circuit held that the Commissioner's charge did not meet the "date" and "circumstances" requirements of Section 706(b) (Pet. App. 1a-14a). The court held that the use of July 2, 1965, the effective date of Title VII, did not meet the "date" requirement of Section 706(b) since it did not give sufficient notice to Shell of the scope of the investigation. *Id.*, at 11a. The court found no "factual basis" in the use of the effective date of the Act. With regard to the "circumstances" requirement of Section 706(b), the court held that the general allegations of discrimination in the charge did not meet the requirements of Section 706(b) because they were not supported by any "factual or statistical bases" (Pet. App. 12a).

SUMMARY OF ARGUMENT

In the absence of a valid charge of discrimination, EEOC is without power to commence an investigation or to issue an administrative subpoena. The failure of the instant Commissioner's charge to comply with the mandatory provisions of § 706(b) and the other charge-filing provisions of Title VII rendered the charge herein legally defective and the underlying subpoena unenforceable.

Title VII places specific and mandatory requirements on the issuance of a charge of discrimination by a Commissioner of the EEOC. Former § 706(a) of Title VII required that a Commissioner's charge set forth the facts on which it is based and that it be based on "reasonable cause" to believe the Act had been violated. It is clear from the legislative history that Congress intended that requirement to operate as a safeguard against agency "fishing expeditions" and other administrative abuses in connection with the issuance of Commissioner's charges. *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971).

The requirements for the issuance of a Commissioner's charge were made even more stringent when Congress replaced § 706(a) with the current § 706(b) in 1972. The 1972 Amendments specifically require the Commissioner to give the charged party notice of the "date, place and circumstances" of the alleged violations rather than merely to set forth the "facts" upon which the charge is based. Courts have interpreted the 1972 amendments as imposing a stricter burden on EEOC for the issuance of Commissioner's charges. *EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978); *New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 708 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975). Since the requirements of § 706(b) are mandatory, the failure of EEOC to adhere to these requirements renders the charge legally defective and the subpoena unenforceable.

The failure to include a good faith estimate of the probable time periods for the alleged discrimination renders the charge defective and the subpoena unenforceable. *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982). The inclusion of a good faith estimate of the probable time periods for the alleged violation is critical, since EEOC is entitled to have access only to information that is "relevant and material" to the charge being investigated. *Dean Witter*, 643 F.2d at 1338. Such a good faith estimate of the probable time periods of a violation must be based on the particular facts underlying the charged party's employment practices.

The instant Commissioner's charge does not contain a good faith estimate of the probable time periods, because the use of the effective date of the Act provides neither sufficient notice to the employer nor a sufficient frame-

work for a court to determine the relevancy of information requested pursuant to a subpoena. In addition, the charge failed to include sufficient information to determine whether the alleged violations continued to within 180 days of the charge. *See EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245 (M.D. Ala. 1980). Since the Commission apparently relied on employment data covering only the period up to the end of 1978, it could *not* have had sufficient information to indicate that the alleged violations were continuing to within 180 days of the charge, which was issued in September 1979. Since the instant charge failed to provide a good faith estimate of the date of the alleged violations, the charge was defective and the subpoena issued pursuant to the charge was unenforceable.

The statement of broad generic forms of discrimination set forth in the instant charge also failed to meet the "circumstances" requirement of Section 706(b). Such an "across-the-board" charge, without any supporting factual or statistical basis, is inconsistent with the plain meaning of Section 706(b) and the Commission's own regulations, and fails to provide the notice contemplated by the "circumstances" requirement. The Eighth Circuit correctly determined that the "circumstances" requirement of Section 706(b) requires the Commission to set forth some factual basis for the charge. Without such a factual basis, a Commissioner's charge is not sufficient to advise the charged employer of the alleged violations and does not provide any factual framework within which a court can determine whether the agency acted within the scope of its authority and whether the subpoena should be enforced. Reasonable notice of the factual basis for the charge, as the Eighth Circuit has required, should not prove to be unduly burdensome to the Commission and will provide the meaningful notice to the employer which Congress envisioned.

ARGUMENT

I. THE COMMISSIONER'S CHARGE HEREIN WAS NOT LEGALLY SUFFICIENT TO MEET THE SPECIFIC, MANDATORY REQUIREMENTS UNDER TITLE VII FOR THE ISSUANCE OF A CHARGE OF DISCRIMINATION BY AN EEOC COMMISSIONER, AND THE SUBPOENA ISSUED PURSUANT TO THE CHARGE WAS UNENFORCEABLE

Title VII requires that an EEOC Commissioner's charge of employment discrimination include the date, place and circumstances of the alleged unlawful practices and that it be in writing under oath or affirmation of the Commissioner. As noted below, these requirements are mandatory and must be fulfilled before a Title VII investigation by EEOC may commence and before an EEOC administrative subpoena may issue. The Commissioner's charge at issue herein was legally defective because of its failure to adhere to these requirements, and thus EEOC was without authority to commence the instant investigation. The date set forth in the amended Commissioner's charge is legally insufficient since it was not a good faith estimate of the probable time periods during which the alleged violations occurred. In addition, the general conclusions of discrimination set forth in the charge do not provide a basis for the Commissioner to swear under oath or affirmation that the broad charges were true, nor do they meet the "circumstances" requirement of Section 706(b).

A. Title VII contains specific, mandatory requirements for the issuance of a charge of discrimination by an EEOC Commissioner

Since its enactment in 1964, Title VII has placed certain specific and mandatory requirements on the issuance of a charge of discrimination by a Commissioner of the EEOC. Former § 706(a) of Title VII, 42 U.S.C. § 2000e-5(a), as enacted in 1964, provided in pertinent part as follows:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (*and such charge sets forth the facts upon which it is based*) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge, provided that such charge shall not be made public by the Commission (emphasis added).

Thus, under § 706(a), to be valid, a charge filed by a member of the Commission had to be in writing, based on "reasonable cause to believe" the Act had been violated, and had to set forth in the charge the facts upon which it was based. Failure to fulfill any of these specific requirements rendered a Commissioner's charge defective.

It is clear that Congress intended § 706(a) to operate as a constraint on EEOC's discretion to issue Commissioner's charges. Thus, in discussing § 706(a), Representative Goodell stated:

> Mr. Chairman, I think the chairman will agree with me that *this is a section to protect us from errant and arrogant bureaucracy*—from an administrator running wild without any reasonable cause. * * * We very carefully provided that *there had to be reasonable cause to believe that there had been a violation before any administrator moved into the situation.*

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.) at 3313 (emphasis added). Similarly, Representative Celler stated:

> In other words, we want to be sure that before the member of the Commission acts, he has reasonable

> cause to believe a violation of the act occurred. *We want unequivocally to nail down that condition precedent* and, therefore, we provide for the additional language.

Id. (emphasis added).

Congress intended that EEOC, unlike many other administrative agencies, would be powerless to commence an investigation in the absence of a charge of discrimination by an alleged victim of discrimination or a valid charge of discrimination by a member of the Commission. *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978); *Stewart v. Core Laboratories, Inc.*, 460 F. Supp. 931, 938 (N.D. Tex. 1978); *New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 712 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).

In this regard, the Fourth Circuit in *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971) stated that:

> Congress sought to control mere 'fishing expeditions' by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner *with sufficient prior information to have reasonable cause to believe* that a statutory violation had occurred. The amendment makes clear not that the EEOC may not subpoena all evidence that 'relates to any matter under investigation or in question,' but that *properly filed charges are the only 'matters' which can be 'under investigation or in question'* (emphasis added).

The Memorandum of Senators Clark and Case, the bipartisan floor managers of Title VII in the Senate, also acknowledged the need for a valid charge in order to trigger an investigation by stating that:

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a *specific charge* has been filed in writing. In this respect, the Commission's investigatory power

> is significantly narrower than that of the Federal Trade Commission, 15 U.S.C. 43, 46, or of the Wage and Hour Administrator, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrong-doing.

110 CONG. REC. 7212, 7214 (1964).

The requirements for the issuance of a Commissioner's charge were changed in 1972, when Congress replaced § 706(a) with the current § 706(b). In enacting § 706(b) in 1972, Congress *increased* the requirements for the issuance of a Commissioner's charge. The Ninth Circuit in *EEOC v. Dean Witter*, 643 F.2d 1334, 1337 (9th Cir. 1980), has stated with regard to the 1972 amendments that:

> The amended § 706(b) varies from its predecessor in three basic respects relevant here: (1) instead of needing 'reasonable cause,' a commissioner must make the charge 'under oath or affirmation;' (2) instead of stating in the charge the 'facts' upon which the charge is based, the Commissioner complainant 'shall serve a notice of the charge' including the 'date, place and circumstances' of the alleged employment practice; and, (3) the amended § 706(b) imposes the same charging requirements upon both the Commissioner and private complainants.

Other Courts which have interpreted § 706(b) have recognized that "[w]ithout doubt, this modification on the requisites, a charge under oath replacing a charge based on reasoned belief, for issuance of a commissioner's charge created a stricter burden." *New Orleans Public Service, Inc., v. Brown*, 369 F. Supp. 702, 708 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975). Likewise, in *EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978), the court stated that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for

> issuance of a Commissioner's charge, certainly creates a stricter burden on the Commission [citations omitted], but that is the clear import of the language Congress placed in the Act in 1972.

See also Stewart v. Core Laboratories, Inc., 460 F. Supp. 931, 933 (N.D. Tex. 1978) (1972 amendment "requires the Commission to file charges 'upon an oath or affirmation,' rather than upon the less onerous requirement of 'reasonable cause' "). Since the requirements of § 706(b) are mandatory, *EEOC v. Appalachian Power Co., supra*, 568 F.2d at 355, any failure of the EEOC to abide by such requirements in issuing the Commissioner's charge renders the charge legally defective.

B. The instant Commissioner's charge failed to include a good faith estimate of the probable time periods of the alleged violations

Section 706(b), as well as the Commission's own regulation, require a Commissioner's charge to set forth the "date" of the alleged violations. Such notification is essential to advise the charged party of the relevant time periods of the alleged violations, and to establish a framework to aid a court in determining what information requested in a subpoena is relevant to the charge. It is clear that the use of the effective date of the Act gives no more additional notice than the Act itself, and does not serve adequately to inform either the charged employer or a court asked to enforce a subpoena, of the scope of the alleged violations. A number of courts which have addressed the issue have rejected Commission attempts to avoid the clear language and purpose of the "date" requirement.

In *Dean Witter*, the Commissioner's charge alleged employment discrimination by the company in the recruitment, hiring, assignment, promotion, training, and terms and conditions of employment for women and minorities. The charge itself contained no date on which the dis-

crimination was alleged to have occurred. EEOC sent the company a copy of the charge and a notice of the charge. On the notice of charge form, EEOC merely stated that the date of the alleged discrimination was "continuing." When the company refused to comply with EEOC's subpoena for information, EEOC sought judicial enforcement, which was denied by the district court. The Ninth Circuit held that § 706(b) mandated that a Commissioner's charge must include notice of the date of the alleged discrimination and that failure to include the date rendered the charge defective. The court stated that use of the term "continuing" may inform the employer "that the practices are continuing in the present but does not disclose whether the practices have occurred in the past, or at least, when they began in the past." *Id.*, at 1338. Since the underlying charge was defective, the court declined to enforce the subpoena.

The Ninth Circuit based its decision in *Dean Witter* on the fact that EEOC is entitled under § 709(a), 42 U.S.C. § 2000e-8(a),[5] only to information that is relevant and material to the charge being investigated. In finding that the dates of the alleged discrimination were necessary to a determination of relevancy and materiality, the Ninth Circuit stated:

> The dates of the alleged unfair practices bear directly on the relevancy of an EEOC enforcement subpoena. By disclosing the dates of the alleged practices under investigation, the EEOC will inform the charged party, as well as the court which is asked to enforce a subpoena, what the proper scope of the investigation should be timewise.

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[5] Section 709(a), 42 U.S.C. § 2000e-8(a), provides as follows:

> In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that *relates to* unlawful employment practices covered by this Title and is *relevant to* the charge under investigation (emphasis added).

643 F.2d at 1338. In *Dean Witter*, the court stated that where the agency is "uncertain about the temporal scope of the challenged practices . . . a good faith estimate of the probable time periods would be sufficient." 643 F.2d at 1338. This requirement of notice to the employer of the date of the alleged discrimination is consistent with EEOC's own regulations, 29 C.F.R. § 1601.12(a)(3), which require that a charge must include:

> A clear and concise statement of the facts, *including pertinent dates*, constituting the alleged unlawful employment practices (emphasis added).

The Eighth Circuit in this case held that the instant Commissioner's charge was deficient because it failed to comply with the requirements of § 706(b). The original Commissioner's charge in this case did not include a date, but rather stated that the alleged violations were "continuing." After the *Dean Witter* decision, the original charge was amended to allege that Shell had engaged in unlawful practices on a continuing basis from at least July 2, 1965, until the present. The Eighth Circuit specifically rejected EEOC's argument that the inclusion of July 2, 1965, as the beginning date of the alleged violations, was sufficient to meet the requirements of § 706(b). In doing so, the court stated that "[t]he purpose of disclosure of a beginning date is to protect the employer from an open-ended investigation by limiting discovery to matters relevant to the charge" (Pet. App. 11a) (citation omitted).

The Eighth Circuit held that a Commissioner's charge "should at least inform the employer of the approximate dates of the unlawful practices and include enough other information to more fully identify the information that has been used as a basis for the subpoena" *Id.* (footnote omitted). With regard to the "date" requirement of § 706(b), the court, in holding that the use of July 2, 1965, as the beginning date of Shell's alleged violation was not sufficient, stated:

> Use of the effective date of Title VII does not give notice to the employer of the parameters of the investigation. We read section 706(b) to require 'some basis in fact for the date alleged in the charge'. *EEOC v. K-Mart Corp.*, 526 F. Supp. 121, 125 (E.D. Mich, 1981). We find no factual basis in the EEOC's allegation of July 2, 1965, as the beginning date of the alleged Title VII violations. *Id.*, at 11a-12a.

Similarly, in *K-Mart*, the Sixth Circuit held that an amended Commissioner's charge that included a date of July 2, 1965 was not sufficient to meet the requirements of § 706(b). In so holding, the Sixth Circuit stated:

> We agree that the date requirement of 706(b) is not satisfied merely by including the effective date of Title VII in the charge. A charge alleging that the unlawful employment practices began on July 2, 1965 does not give the employer, the district court, or the EEOC's investigators any objective basis to determine the temporal scope of the investigation. 694 F.2d at 1063 (footnote omitted).

Citing *Dean Witter*, the Sixth Circuit also concluded that where there is uncertainty as to the temporal scope of the alleged unlawful practices, "EEOC should make a good faith estimate of the date the unlawful practices began." *Id.*, at 1064.

Thus, the decision of the Eighth Circuit in this case is supported by the decisions of the Ninth and Sixth Circuits in *Dean Witter* and *K-Mart*,[6] respectively, and by

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[6] The Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, —— F.2d ——, 32 FEP Cases 279 (7th Cir. 1983) recently rejected an employer's challenge to the use of the effective date of the Act in a Commissioner's charge. In that case, the employer apparently had argued that the Commission had a *pro forma* policy of using the effective date of the Act. After a hearing, the district court accepted the statements of the Commission that there was no such *pro forma* policy and the Seventh Circuit determined that the district court determination was not clearly erroneous. However, the issue presented in the instant case is not whether the Commission has a *pro forma* policy of inserting the effective date of the

a plain reading of Section 706(b) and the Commission's own regulations. As set forth below, a "good faith estimate" of the date of the alleged violations must be based on an assessment of the facts underlying the employment practices of the charged party and otherwise must comply with the requirements for timely charges set forth under Title VII. Based upon the information in this charge, there simply is no way for a court to determine whether the date here was used in good faith. The use of the effective date of the Act in the instant charge thus was not sufficient to give the charged employer the type of meaningful notice required by Section 706(b).

The inclusion of a "good faith estimate of the probable time periods" is particularly important since § 706(e), 42 U.S.C. § 2000e-5(e), provides that "a charge under this section [§ 706] shall be filed *within one hundred and eighty days* after the alleged unlawful employment practice occurred" (emphasis added). Pursuant to the 1972 amendments to Title VII, § 707(e), 42 U.S.C. § 2000e-6(e), authorizes EEOC "to investigate and act on a charge of a pattern or practice of discrimination whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." However, § 707(e) provides that "[a]ll such actions shall be conducted in accordance with the procedures set forth in section 706 of the Act." In *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258-62 (M.D. Ala. 1980), the court held that "the clear language of § 2000e-6(e) [§ 707(e)] makes the 'procedures' of § 2000e-5 [§ 706] applicable to pattern or practice suits and that the 180-day period set out in § 2000e-5(e) [§ 706(e)] is one of those procedures." 490 F. Supp. at 1260. The inclusion of a good faith estimate of the probable time periods and "enough other information to more fully identify the information that has been used as the basis for the subpoena" (Pet. App.

Act, but whether whatever date is used is a good faith estimate of the probable time periods of the alleged violations that has some basis in fact.

11a) is crucial to a determination of whether the requirements of § 706(e) have been satisfied. It is insufficient merely to allege a "continuing" violation without setting forth a sufficient factual basis to indicate that the alleged violations are amenable to a continuing violation theory and that such alleged violations have continued to within 180 days of the charge.

An employer who may have engaged in unlawful employment practices which were not the subject of a timely charge is entitled to treat those past acts as lawful since "[a] discriminatory act which is not made the basis for a timely charge is the equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Thus, unless EEOC can show that an actual violation continued to within 180 days of the charge, prior unlawful acts are "merely an unfortunate event in history which [have] no present legal consequences." *Id.* In fact, it is quite possible that an employer may have treated minorities and women in a wholy lawful manner for the 180 days immediately preceding a Commission's charge. In such an instance, the Commission could not demonstrate a continuing pattern or practice of discrimination. EEOC apparently has assumed that allegedly discriminatory acts which may have occurred in the past have necessarily continued up to the filing of the charge.[7]

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[7] This assumption has no basis in law, and is inconsistent with the "oath or affirmation" requirement of § 706(b), which requires that a Commissioner possess sufficient factual information to be able to swear under "oath or affirmation" that the charge is true. Such an assumption is equally as faulty as the assumption apparently relied upon by EEOC that a current pattern or practice charge implied that the discrimination had existed since the effective date of Title VII. This assumption was set forth in its "Petition by the Equal Employment Opportunity Commission for Rehearing and Suggestion for Rehearing En Banc" filed in *Dean Witter*:

> Until the decision in this case, the Commission had assumed that when any charge alleges a pattern and practice of current

Accordingly, whenever the Commission includes a date in a Commissioner's charge that is more than 180 days from the date the charge is filed, the agency should be required to demonstrate in the charge, through a factual or statistical showing, that the unlawful acts continued to within 180 days of the charge.

The statistical data that are set forth for the first time in the Solicitor's reply brief on petition for writ of certiorari demonstrate that Comissioner Norton apparently did *not* have sufficient information to be able to swear that the alleged unlawful practices continued to within 180 days of the issuance of the charge. The only statistical data set forth which relates to Shell's workforce covered the period through the end of 1978. Thus, there apparently was *no* statistical data on Shell's workforce or any hiring or other employment actions of the company ocurring within 180 days of the charge, that would enable Commissioner Norton to swear under "oath or affirmation" that any alleged unlawful employment practices had continued to within 180 days of the charge. Accordingly, since there was no factual basis for an allegation of a continuing violation, the instant charge was untimely, because it was not filed within 180 days of any conduct or practice about which the Commission had information.

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discrimination, the pattern and practice is alleged to have persisted since the effective date of Title VII: July 2, 1965. A commissioner or other person filing a charge alleging a pattern or practice of discrimination is unlikely to know when the employer began to discriminate. If Dean Witter now refuses to hire blacks, women and Hispanic-Americans, it can be fairly inferred that this is not a new policy; if it currently assigns women, and minorities to lower paying positions, a commissioner can reasonably infer that it has always done so. The pro forma insertion of the date "July 2, 1965" into a pattern and practice charge adds nothing that cannot already reasonably be inferred from a claim, say, that the employer *continues* to refuse to hire blacks or *continues* to assign them to menial jobs.

A requirement that the date set forth in a Commissioner's charge bear a relationship with the facts of the charged party's employment practices and otherwise comply with the charge-filing requirements of Title VII, does not impose onerous new pleading requirements on the Commission, nor does it demand an inquiry into the underlying merits of the charge and employer defenses at the subpoena enforcement stage. Rather, a requirement that EEOC should be held to its statutory and regulatory requirements merely will require the agency to conduct the reasonably thorough preliminary investigation contemplated by Congress before the charge is issued and to establish a good faith estimate of the probable date based on the facts ascertained in this preliminary investigation. Rather than interfering with the enforcement process, the narrowing of the charge and the subpoena to the relevant and probable time period should enable the agency to function more efficiently. Such a focusing of the Commission on the relevant time period will enable the Commission and the employer better to evaluate the validity of the charges and may encourage voluntary resolution without the need for contested litigation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

C. The instant charge did not meet the "circumstances" requirement of Section 706(b) since it set forth no factual basis for the alleged violations

With regard to the requirement of § 706(b) relating to the "circumstances' 'of the alleged unlawful practices, the Eighth Circuit in this case held that the statement of circumstances must be supported by "some factual or statistical basis" (Pet. App. 12a). The court stated that "[a] charge which simply alleged discrimination in all areas of employment practice without some factual or statistical basis gives the appearance of a 'fishing expedition' and fails to give the employer sufficient notice." *Id.* (citation omitted). In summary, the court stated

that a valid Comissioner's charge should contain the following:

> the type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (e.g., failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (e.g., applicant, employee, former employee). *Id.*

In so holding, the Eighth Circuit confirmed that mere "across-the-board" conclusory allegations of discrimination, as in the instant charge, are not sufficient to meet the "circumstances" requirements of Section 706 (b). Rather than mandating a "stringent pleading standard" as the Solicitor has argued (Pet. Br. 23), the decision of the Eighth Circuit merely requires the Commissioner to set forth sufficient facts in the charge to provide reasonable notice to the employer of the alleged violations. The decision of the Eighth Circuit is consistent with the plain meaning of the statutory language and with the Commission's own regulations, which require that a charge must contain "[a] clear and concise statement of the facts . . . constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3).

In the absence of some basis in fact for the allegations, it is impossible for the employer or a court to determine whether the Commissioner possessed sufficient information to be able to swear "under oath or affirmation" that the charge is true. As set forth above, the requirement in Section 706(b) that charges be "under oath or affirmation" imposed a more stringent burden on a Commissioner for the issuance of a Commissioner's charge than did the "reasonable cause" standard under former Section 706(a). The Eighth Circuit's requirement that the charge set forth a reasonable factual basis for the allegations of discrimination is consistent with the enhanced "oath or affirmation" requirement under Section 706(b),

and assures that the oath requirement indeed has some meaning.[8]

In *Dean Witter*, the Ninth Circuit stated that the "circumstances" requirement of Section 706(b) was satisfied by a "listing of the nature of the alleged employment practices, even though essentially conclusory in nature." 643 F.2d at 1337. Likewise, in *K-Mart*, the Sixth Circuit, in dictum, stated that "[w]e do not agree with the Eight Circuit's holding in *Shell Oil* that section 706(b) requires 'some basis in fact.'" 694 F.2d at 1063 n.7.[9] It is submitted, however, that this approach to the "circumstances" requirement of Section 706(b) adopted by the Ninth and Sixth Circuits neither provides adequate notice to the employer of the alleged violations nor does it provide the control on the Commission's investigatory authority which Congress sought to ensure.

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[8] The Solicitor has relied on a number of cases which were decided *before* the 1972 amendments to Title VII and which involved an interpretation of former Section 706(a) and not the requirements of the current Section 706(b). *See, e.g.*, cases cited at Pet. Br. 19-20. However, these pre-amendment cases do not provide support for the Solicitor's argument regarding the requirements of Section 706(b). As noted above, the charge-filing requirements were changed substantially by the 1972 amendments and the courts which have interpreted these changes have concluded that the amendments effected a stricter burden on the Commission for the issuance of charges. Accordingly, these pre-amendment cases offer no support for the Solicitor's position.

[9] The *A.E. Staley* decision of the Seventh Circuit, noted above, rejected the employer's argument that a Commissioner's charge must set forth the factual basis on which the charge is based. In doing so, the Seventh Circuit reasoned that to require the inclusion of a factual basis in the charge would be to require the agency to demonstrate probable or reasonable cause before a subpoena may be enforced. However, as noted below, the decision of the Eighth Circuit in the instant case does *not* require a showing of probable or reasonable cause, but requires merely that the express statutory notice requirements of Section 706(b) be met. *See* dissent of Judge Bauer, 32 FEP Cases at 286.

As noted above, Congress intended that the Commission would have authority to act only when a "specific charge" of discrimination was filed. Unlike other federal agencies, such as the Federal Trade Commission (FTC) and the Wage and Hour Administrator of the Department of Labor, the Commission was not given "self-starting" investigatory authority and was to be without authority in the absence of a valid charge. While it is clear from the legislative history of Title VII that the primary, if not the sole, purpose of EEOC Commissioner's charges was the protection of individuals who feared reprisal if they filed a charge, *see Legislative History of Titles VII and XI of the Civil Rights Act of 1964* (EEOC Compilation, printed by W.S. Hein & Co.) at 3305, most Commissioner's charges today are issued pursuant to EEOC's "systemic" program and *not* as a result of an individual charge. *See* EEOC Compliance Manual (BNA), § 16. Thus, unless the Commission is held in a meaningful way to the express charge-filing requirements of Section 706 (b), it will have assumed the very authority which Congress consciously and expressly declined to give it. In order for the "circumstances" requirement of Section 706(b) to have any meaning, it should be interpreted by this Court as requiring the Commission to set forth in the charge in a reasonable manner the factual basis for the allegations of discrimination. Since the "factual basis" underlying the Commissioner's charge is developed by Commission personnel and is included in a "presentation memorandum" which is submitted to the Commissioner along with the proposed Commissioner's charge, *see* EEOC Compliance Manual (BNA), § 16, providing reasonable notice of such "factual basis" should not prove to be disruptive or burdensome.

II. THE POLICY ARGUMENTS ADVANCED BY THE SOLICITOR ARE NOT CONVINCING

The Solicitor has maintained that the decision of the Eighth Circuit will require the Commission to adhere to a "stringent pleading standard" (Pet. Br. 23), and will require the Commission "to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause" (Pet. Br. 34). In addition, the Solicitor has argued that the lower courts' review of the Commissioner's charge was "contrary to the Court's emphatic holding in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (*"Socal"*), that federal courts may not intrude upon an administrative proceeding at its very outset" (Pet. Br. 42). However, the arguments of the Solicitor misinterpret the Eighth Circuit's decision and provide no persuasive reason why this Court should not interpret the language of Section 706(b) according to its plain meaning.

The decision of the Eighth Circuit neither mandates an unreasonable "pleading requirement" on the Commission, nor does its require the Commission to prove "reasonable cause" or "probable cause" prior to commencing its investigation. Rather, the Eight Circuit's decision merely gives effect in a reasonable fashion to the express "date" and "circumstances" notice requirements of Section 706(b). All that the decision of the Eighth Circuit requires is that the Commission set forth in a reasonably specific fashion the approximate dates of the alleged violations and the factual basis in support of its allegations. Such a requirement will provide the notice to the charged employer contemplated by the clear language of Section 706(b), while not unduly interfering with the authorized functions of the Commission. As noted above, the inclusion of this information in the charge can be accomplished readily since information regarding the "date" and "circumstances" of the alleged violations should be available to the issuing Commissioner in the "presentation memo" accompanying the proposed charge.

The Solicitor's reliance on *Socal* is misplaced for two fundamental reasons. First, the Commission since the 1972 amendments has not been authorized to operate under the largely discretionary "reasonable cause" standard for the issuance of a Commissioner's charge. As noted above, the 1972 amendments set forth express requirements for the issuance of a Commissioner's charge which must be met for a valid charge to issue. Unlike the "reason to believe" standard in *Socal* and the pre-amendment "reasonable cause" standard, the issuance of a charge is not left wholly to the discretion of an individual Commissioner, but rather must meet the explicit requirements of Section 706(b). The second reason that the Solicitor's reliance on *Socal* is not persuasive is that a court which is called upon to enforce a subpoena issued pursuant to a Commissioner's charge *must* determine that the underlying charge is valid before the subpoena may be enforced. *See, e.g., K-Mart, supra*, 694 F.2d at 1061. As noted above, Congress intended that the Commission would have authority to act *only* on a specific charge of discrimination and expressly declined to grant to the Commission the type of self-starting authority possessed by the FTC and certain other federal agencies. Accordingly, a court called upon to enforce a subpoena would abuse its discretion if it did not make an initial determination that the Commissioner's charge was valid. Since this initial determination of the validity of a Commissioner's charge *must* be made in a subpoena enforcement action, the reluctance to interfere in the early stages of the administrative process which this Court expressed in *Socal* simply is not warranted.

CONCLUSION

For the foregoing reasons, EEAC submits that the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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No. 82-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission can satisfy the oath and notice requirements regarding the "circumstances" element of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of any specific factual averment.

2. Whether a Commissioner of the Equal Employment Opportunity Commission can select a respondent employer as the target of a charge of discrimination under Section 706(b) on an audit basis.

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IN THE

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SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

With the consent of all the parties, the National Association of Manufacturers (NAM) files this brief in support of the Respondent. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM has a membership of approximately 13,000 manufacturing and related business concerns which, in the aggregate, produce an estimated 80 percent of all goods manufactured in the United States.

Our members employ a great many people and, as such, are subject to the Civil Rights Act which is enforced, in pertinent part, by the Petitioner, the Equal Employment Opportunity Commission (EEOC). NAM members believe that equal opportunity in employment is a prime objective which American industry should actively and

continually support. So too are our members generally willing to cooperate with the EEOC's reasonable attempts to enforce the law.

However, we view with some concern the Petitioner's practice of filing vague and general charges of discrimination which can lead, during the investigation of the charges, to costly and time consuming searches of corporate files. Affirmance of the decision of the lower court herein will serve to curtail the EEOC's ability to engage in time-consuming and burdensome fishing expeditions through corporate files, whereas a reversal or dilution of that decision will serve simply to perpetuate the agency's current practices. With our broad base of representation, we believe that we can present the Court with a perspective beyond that which is represented by the Respondent.

SUMMARY OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chairman of the Equal Employment Opportunity Commission (EEOC) filed a charge against the Shell Oil Company (Shell) alleging "across the board" discrimination at Shell's Wood River, Illinois, refinery. The charge consisted of boilerplate and conclusory allegations of discrimination. It did not allege specific discriminatory practices or instances; nor did it identify either the period during which alleged discriminatory practices were in effect nor the date of any alleged instances of discrimination.

The EEOC served Shell with a copy of the charge and a request for information on October 26, 1979. In response, Shell sought from the EEOC specific information that would support the issuance of the charge so that it could both understand its basis and be better able to respond to the request for information. The EEOC refused to provide any further information and issued an administrative subpoena to Shell for the sought-after materials.

Having exhausted its administrative remedies, Shell sought declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. On appeal from a decision in that court which enforced the subpoena of the EEOC, the Eighth Circuit held that the charge failed to provide a factual basis for itself and also failed to provide adequate notice of the date and circumstances of the alleged violations as required by Section 706(b). Later, as a result of the EEOC's petition for a rehearing, to which Shell was not permitted to respond, the Eighth Circuit modified its opinion to imply that a charge could be based on statistics developed by the EEOC. However, the court noted that, in such a case, such data should be disclosed in the charge. It was from these decisions of the Eighth Circuit that the EEOC sought review by this Court.

SUMMARY OF THE ARGUMENT

This case represents an opportunity for this Court to authoritatively eliminate the EEOC's persistent refusal to adhere to the clear mandate and intent of the 1972 amendments to the Civil Rights Act that require a commissioner to state, under oath and with specificity, the precise nature of the charges of employment discrimination that are being made against the employer. 42 U.S.C. § 2000e-5(b) (1981).

The EEOC continues to use vague and open-ended charges, often followed by date amendments, in its efforts to enforce the law. It claims that to do more would turn its charges into something akin to formal judicial proceedings, the notice requirements of Section 706(b) notwithstanding. As a result, the EEOC has ignored the intent of Congress, with the upshot being that it has opted to use its investigatory powers to conduct broad, far-reaching, virtually limitless searches of corporate files in the hope of finding some instance of discrimination that will, in the end, justify the initial charge. The

severe and unnecessary impact and costs of these regulatory forays through corporate files will be a burden for all business entities, but disproportionately so for smaller businesses and, in the end, for the public. Accordingly, the decision of the Eighth Circuit should be affirmed by this Court.

I. THE COMMISSIONER'S CHARGE HERE IS INSUFFICIENT TO MEET THE REQUIREMENTS SPECIFIED BY TITLE VII OF THE CIVIL RIGHTS ACT.

A basic underpinning of the American legal system is the principle that anyone charged with a violation of a law must be given adequate notice of the particulars of that charge. The reasons for this are based on principles embodied in the Constitution as well as concepts of fundamental fairness. Without such notification, it is impossible for the party charged to be certain of what practices must be defended and thus prepare an adequate defense.

Here, the EEOC, an agency created to investigate and conciliate charges of alleged discrimination brought by and on behalf of employees, issued, in the name of one of its commissioners, a broadly-worded boilerplate allegation of discriminatory employment practices against the Respondent. The charge did not allege specific practices or incidents; nor did it identify either the period during which the alleged discriminatory acts took place or the date of any single incident of discrimination. Rather, it stated simply that the illegal acts began on July 2, 1965—the effective date of Title VII.

In amending Title VII in 1972, Congress provided that a charge of discrimination must include the date, place, and circumstances of the unlawful employment practices. 42 U.S.C. 2000e-5(b) (1981). In the decision below, the Eighth Circuit correctly held that the charge at issue failed to provide adequate notice of the "date" and "cir-

cumstances" as required by Title VII, since a Respondent employer must, under the statute, have adequate notice of the "approximate dates of the unlawful practices" alleged, including an approximate beginning date. *Shell Oil Co. v. EEOC*, 676 F.2d 322, 325 (8th Cir. 1982). The court determined that the use of the effective date of Title VII does not satisfy the requirement of providing "notice to the employer of the parameters of the investigation." *Id.* Further, the Eighth Circuit noted that "the general nature of that data [which substantiates a charge] should be disclosed in the charge." *Id.* at 326, n.5.

We submit that a broadly worded, essentially dateless charge such as that presented here is so lacking in the basic standards of required notice that it amounts to a virtual nullity. The automatic insertion of the effective date of Title VII in a commissioner's charge is meaningless, in our view, and is not the required good-faith statement of the "dates of the alleged unlawful practices" that Section 706(b) of the Civil Rights Act contemplates. Specifically, the charge here does not allege any specific act of discrimination of any type for the entire period at issue at the Respondent's Illinois refinery. Further, employment statistics had shown that Shell's minority hiring and promotion rates exceeded the surrounding population percentage, and studies by the Office of Federal Contract Compliance had revealed that the firm was in compliance with the applicable affirmative action laws. Against this backdrop, Shell rightly made a discovery request for information concerning the bounds and bases of the allegations. These requests were refused.

A. Title VII Contains Specific Requirements for the Issuance of a Charge of Discrimination.

Perhaps because it was created to operate in the sensitive area of civil rights, the EEOC was empowered to commence an investigation of a charge of discrimination only where there is an allegation of the same by a vic-

tim, or a *valid* charge is made by a member of the Commission. *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978) (per curiam). The Fourth Circuit has noted that:

> Congress sought to control mere "fishing expeditions" by requiring investigations to be preceded by the filing of a charge . . . by a Commissioner *with sufficient prior information to . . . believe* that a statutory violation has occurred. The . . . EEOC may not subpoena all evidence that "relates to any matter" [but only to that which relates to a properly filed charge]. *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971) (emphasis supplied).

Essential to the existence of a "properly filed charge" is some indication of its temporal scope. To merely choose an arbitrary starting date and allege that the statutory violation is "continuing" does not "disclose whether the practices have occurred in the past, or at least, when they began in the past." *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980).

Under 42 U.S.C. 2000e-8(a), the EEOC is entitled only to information that is "related to unlawful employment practices . . . and is relevant to the charge under investigation." Some indication of the dates on which the alleged discriminatory acts took place is necessary to a determination of this relevancy:

> The dates of the alleged unfair practices bear directly on the relevancy of an EEOC enforcement subpoena. By disclosing the dates of the alleged practices under investigation, the EEOC will inform the charged party . . . what the proper scope of the investigation should be time-wise. *Dean Witter*, at 1338.

This notice requirement is, incidentally, entirely consistent with the EEOC's own regulations at 29 C.F.R. 1601.12(a)(3) (1981) which require that a charge include the "pertinent date" of an alleged unlawful employment practice. Further, it has been held in other

contexts that the "relevance" of a document to an agency investigation must be construed to connote something more than mere convenience; the creation of a relevance standard based on nothing more than a document's utility as a potential "road map" to the discovery of a possible wrong has been rejected. *United States v. Matras*, 487 F.2d 1271, 1275 (8th Cir. 1973).

The court below held that the Commissioner's charge was at variance with the requirements of the statute and therefore deficient. In response to the assertion that use of the effective date of Title VII as the starting date of the violation was sufficient to meet the statutory requirement, the court noted that "[t]he purpose . . . of an approximate beginning date is to protect the employer from an open-ended investigation by *limiting discovery to matters relevant* to the charge." *Shell Oil Co.*, at 325. The arbitrary utilization of the effective date of Title VII simply failed to meet this threshold test. A valid charge must thus contain a date and a statement of the circumstances "supported by some factual or statistical basis." *Id.* at 326. Such a foundation is, according to the Eighth Circuit, lacking in the charge at issue here:

> A charge which simply alleges discrimination in all areas of employment practices without some factual or statistical basis, gives the appearance of a "fishing expedition" and fails to give the employer sufficient notice [of the charges]. *Id.*

Vague and essentially dateless charges of discrimination simply do not meet the clear requirements set forth by Congress in Title VII. These requirements were written into the law to protect entities from complying with burdensome requests for potentially groundless and expensive fishing expeditions through their files. Thus, the decision of the Eighth Circuit below should be upheld if the intent of Congress is to be given its full effect.

B. Rigorous Adherence to Title VII's Requirements For the Issuance of a Commissioner's Charge is Necessary to Prevent Onerous and Burdensome Discovery Requests.

From its inception, Congress circumscribed the EEOC's powers of investigation so that they could be exercised only once a specific charge had been filed. It is important to note that this is significantly narrower than the grant of investigatory authority made to other agencies, like the Federal Trade Commission and the Wage and Hour Administration, that are authorized, for instance, to conduct investigations, inspect records, and issue subpoenas whether or not there is any complaint of wrongdoing. *See* 110 Cong. Rec. 7212, 7214 (1964). While there is little information on the precise reason for this limitation, it could be argued that it was done to prevent costly searches of confidential data which, of necessity, must be gleaned from employee personnel files. Since the nature of the EEOC's mission is the safeguarding of *individual* rights, it is likely that Congress sought in this fashion to limit the necessary revelation of confidential data on individuals absent a specific, certain, and well-documented reason therefor.

At bottom, the EEOC is seeking information from the employment files of all employees at one of the Respondent's major refineries from 1976 through 1980, and could, if desired, seek records dating back to July 2, 1965. Without adherence to the requirements of Title VII, this request for information will require an incredibly expensive, onerous, and time-consuming search. Given the vague nature of the allegations, it is quite likely that the bulk of the search will reveal nothing that is pertinent to the charge, but the point is that without the particularity required by Title VII, it is impossible for the Respondent here to know precisely what is being sought or to limit the search in any meaningful fashion.

The impact that a reversal of the holding of the court below here would have should be clear. Many smaller

and medium-sized companies would be literally forced to shut down entire personnel departments in order to comply with a request or subpoena for information based on broadly-worded and generalized charges like those at issue here.[1] It is doubtful that the Congress contemplated such a result when it passed Title VII. Further, many of these companies would be unable to seek judicial intervention to prevent the waste and spoliation of corporate resources that would be a direct result of information demands based on vague and broadly worded charges.

As such, we suggest that an efficient means of preventing this result would be the affirmation of the decision of the court below which, in turn, echoes Congress's intent that EEOC investigations, and requests for information related thereto, must be the result of a particularized complaint with clearly delineated boundaries.

II. THE REQUIREMENT THAT AN EEOC COMMISSIONER'S CHARGE MUST BE MADE UNDER OATH IMPOSES A HIGH BURDEN THAT IS NOT MET BY A MERE RECITAL OF THE ALLEGED VIOLATION.

The EEOC continues to allege that changes made to Title VII in 1972 that require a Commissioner's charge to contain a "sworn oath" of "date, place, and circumstances" of the unlawful practice is little different from its earlier "reasonable cause to believe" standard.

We respectfully disagree. An oath is a solemn undertaking requiring a good-faith belief that the facts of the charge are true. The requirement of an oath, as well as the specificity requirements contained in the 1972 amendments, have been construed to impose a higher standard

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[1] The vague and generalized charge made by the EEOC here is not unique, and has resulted in equally vague and burdensome discovery requests in *EEOC v. Dean Witter Co., Inc.*, 643 F.d 1334 (9th Cir. 1980), *EEOC v. C. A. Norgren Co.*, 535 F. Supp. 491 (D. Colo. 1982), and *EEOC v. K-Mart Corp.*, 526 F. Supp. 121 (E.D. Mich. 1981), as shown in Appendix I.

of proof on the Commission than that which existed prior to 1972. *See EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 355 (4th Cir. 1978) (per curiam), where the court stated that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission (citations omitted), but that is the clear import of the language Congress placed in the Act in 1972.

The requirement of an oath, added in 1972, would be diluted by a reversal of the decision of the court below. Further, we suggest that, even under the pre-1972 language of Title VII, there was a significant congressionally imposed constraint placed upon the exercise of the EEOC's power to charge a party with a violation of the law. In referring to the old "reasonable cause to believe" standard, it was stated in a congressional colloquy that the purpose of this standard was to protect the public from an errant and arrogant bureaucracy, and that there had to be at least a reasonable cause to believe that there had been a violation before any administrative action could be taken by the EEOC.

The higher burden carried by the Commission due to the addition of the oath requirement has not gone unnoticed by the courts. In *EEOC v. Sears, Roebuck and Co.*, 490 F. Supp. 1245 (M.D. Ala. 1980), the court dismissed an EEOC action for failure to comply with this oath requirement. The court noted:

> . . . the more vague and expansive a charge filed by the EEOC is, the more strictly this Court should require the EEOC to comply with the clear wording of the statute which requires such charges to be verified by a Commissioner of the EEOC. *Id.* at 1253.[2]

[2] Where the courts have been presented with cases and issues that allow them to reexamine their prior case law on the validity of EEOC charges, almost all have modified it to recognize the new

We suggest that the oath requirement, in raising the standard of proof required of the EEOC, makes it imperative that the specific facts and circumstances that form the basis of the charge be sworn to in the mandated manner. Such is not the case here. Indeed, the charge at issue gives no facts or dates but merely and baldly asserts that the Respondent had violated the law. In our view, this does not meet a standard that requires a swearing as to the veracity of the facts alleged; it is doubtful that the charge here would be deemed sufficient under even the old "reasonable cause to believe" standard. What the Respondent here has been presented with is little more than a boilerplate recitation of the wrongs that the statute makes actionable, namely, conclusory allegations of discrimination. Such an approach to a requirement that a violation be clearly, unambiguously, and authoritatively stated and verified prior to the start of an investigation has been rejected in other contexts and should, to give meaning to the intent of Congress, be rejected here in the manner adopted by the court below. *See In re Establishment Inspection of Northwest Airlines, Inc.*, 437 F. Supp. 533 (E.D. Wisc. 1977), *aff'd*, 587 F.2d 12 (7th Cir. 1978).

CONCLUSION

Employers, large and small, are willing to abide by the letter as well as the spirit of the Civil Rights Act. They only request that their rights be honored and respected. In short, they ask only that the EEOC present them with "some evidence of the materiality of the papers demanded" in an investigation of an alleged violation of an individual's civil rights. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924). Without an unambiguous charge and a clear demonstration of the relevancy of the agency's request

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oath and/or increased factual specificity required by the 1972 amendments to Title VIII as in the cases noted in Appendix II.

for documents and information, the EEOC should be rebuffed in its attempt to gain enforcement of an open-ended and vague subpoena which violates the spirit of the 1972 amendments to Title VII, especially when compliance therewith could unduly burden the operation of the entire business for an unknown period of time.

Accordingly, this Court should strike down the EEOC's boilerplate Commissioner's charge and related subpoena duces tecum as invalid and affirm the decision of the court below.

Respectfully submitted,

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July 22, 1983

APPENDIX I

IN *SHELL*:

Lists of: employees including their sex, race, date of hire, position and salary; applicants for hire identified by race and sex; persons who sought promotion or transfers identified by race and sex, indicating the reason for selection or nonselection; vacancies filled, indicating minimum qualifications required and identity by race and sex of persons selected; employment tests administered indicating the sex, race, and score of each person taking such test and employment action taken as a result; training programs used, positions for which they were used, and sex of participants; enumerated employment criteria used by Shell such as arrest records, credit checks, previous salary, height or weight. The subpoena also requested information regarding the existence of personnel data on computer file. (28 FEP 1088, n.2).

IN *DEAN WITTER*:

a) the types of computers, if any, used for this processing of personnel data;

b) all sort and information retrieval programs used in conjunction with such machines and manuals relating to such programs;

c) the purpose, nature and source of computer services, if any, provided under service contracts for such machines;

d) all past and present computer files containing personnel information and the contents, codes and operations relating thereto;

e) the existence and location of copies of such files and operations relating thereto;

f) the existence of *computer files used in* complying with the requirements of the *Internal Revenue*

Service, the Equal Employment Opportunity Commission, the *Securities and Exchange Commission*, the *Social Security Administration*, the *New York Stock Exchange*, and other various state and local government agencies, and operations related thereto.

IN *NORGREN*:

a. *Complete* personnel files of nearly every employee and position

b. Job applications for nearly every plant position

c. Listing of all computer programs and reports

d. Repetitious organizational charts

e. Numerous other multiple set categories of data demands (32 in all)

(Subpoena filed in District Court)

IN *K MART*:

The first subpoena requested the production of magnetic tape copies from K Mart's computer files of the following: 1) Current Payroll Master File for K-Mart International Headquarters employees; 2) the W-2 Work File for 1977, 1978, and 1979, for employees at K Mart's Troy International Headquarters and K Mart Enterprises, Inc.; 3) the Payroll Master File for 1977, 1978, and 1979 for employees at K Mart's Troy International Headquarters and K Mart Enterprises, and 4) copies of all computerized files containing any information on K Mart's Troy International Headquarters and K Mart Enterprises pensions from July 2, 1965 to October 1, 1980. The second subpoena requested that K Mart produce Robert Burnley, a K Mart executive who was responsible for maintaining K Mart's employment records for deposition (n.2, Sixth Circ. opin.)

APPENDIX II

COURT	1972 AMENDMENT INTERPRETATION CASE	PREVIOUS CASE MODIFIED	HEIGHTENED REQUIREMENT
1. Fourth Circuit	*EEOC* v. *Appalachian Power Co.*, 13 FEP Cases 1294 (D.C. Va. 1976); *aff'd.*, 16 FEP Cases 390, 568 F.2d 355 (1978)	*EEOC* v. *General Electric Co.*, 532 F.2d 359	Oath requires factual allegations; old reasonable cause affidavit insufficient.
2. Fifth Circuit	*New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. 702, *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975)	(No prior case on the Commissioner's charge issues)	Oath requirement and new "notice of charge" read together, requiring a detailed specification of dates, places and circumstances of alleged discriminatory acts. (369 F. Supp. at 707-8)
3. Ninth Circuit	*EEOC* v. *Dean Witter & Co.*, 643 F.2d 1234 (1980)	*Local No. 104, Sheet Metal Workers Int. Assn.* v. *EEOC*, 439 F.2d 237 (9th Cir. 1971)	Specific date requirement
4. Eighth Circuit	*Shell Oil Co.* v. *EEOC*, 522 F. Supp. 79, *rev'd*, 676 F.2d 322	*EEOC* v. *Chrysler Corp.*, 567 F.2d 754	Specific factual date and circumstances of alleged violation required to be identified in the charge; reasonable cause insufficient.
5. Seventh Circuit	*EEOC* v. *Staley Mfg. Co.*, No. 82-1855 (7th Cir. July 1, 1983)	*General Employment Enterprises, Inc.* v. *EEOC*, 448 F.2d 722 (7th Cir., 1971)	Oath requirement & examination of the date inserted to see if it was inserted *pro forma* in that case.

No. 82-825-CFX
Status: GRANTED

Title: Equal Employment Opportunity Commission, Petitioner
v.
Shell Oil Company

Docketed:
November 16, 1982

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Williams, Robert E.

Entry	Date	Note	Proceedings and Orders
1	Oct 8 1982		Application for extension of time to file petition and order granting same until November 17, 1982 (Blackmun, October 13, 1982).
2	Nov 16 1982	G	Petition for writ of certiorari filed.
4	Nov 24 1982		Order extending time to file response to petition until January 19, 1983.
5	Jan 19 1983		Brief of respondent Shell Oil Co. in opposition filed.
6	Jan 26 1983		DISTRIBUTED. February 18, 1983
7	Feb 9 1983	X	Reply brief of petitioner EEOC filed.
8	Feb 22 1983		Petition GRANTED.
			**********
10	Apr 6 1983		Order extending time to file brief of petitioner on the merits until May 9, 1983.
11	May 10 1983		Brief of petitioner filed.
12	May 11 1983		Joint appendix filed.
14	May 31 1982		Order extending time to file brief of respondent on the merits until July 22, 1982.
15	Jul 22 1983		Brief amicus curiae of National Assn. of Manufacturers filed.
16	Jul 22 1983		Brief amicus curiae of Chamber of Commerce of U.S. filed.
17	Jul 22 1983		Brief of respondent Shell Oil Co. filed.
18	Jul 22 1983		Brief amicus curiae of Equal Employment Adv. Council filed.
19	Aug 2 1983		CIRCULATED.
20	Aug 6 1983		Record filed.
21	Aug 6 1983		Certified original record & C.A. proceedings, 2 volumes, received.
22	Sep 21 1983		SET FOR ARGUMENT. Monday, October 31, 1983. (2nd case)
23	Oct 20 1983	X	Reply brief of petitioner filed.
24	Oct 20 1983		Lodging filed, to be returned to Room 5614, Dept. of Justice.
25	Oct 31 1983		ARGUED.

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